Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

JERRY GOZA AND GLADYS P. GOZA,

Respondents.

On Petition for Writ of Certiorari to the State of Louisiana Court of Appeal First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When state and local law enforcement officers, in conjunction with their traditional accident investigation duties, compile highway hazards data in uniform motor vehicle accident reports which are funded, designed and formatted by the Louisiana Department of Transportation and Development using federal highway safety funds, and where those officers are trained with federal safety funds in accurately compiling the safety data, all for the purpose of gathering highway hazards data pursuant to the mandate of the Hazard elimination program of 23 U.S.C. § 152, do those reports constitute *"reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title* [title 23 of the United States Code] *or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing federal-aid highway funds"* such that *"they shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data"*?

LIST OF PARITES

The parties to the proceedings are: Petitioner-Appellant-Defendant State of Louisiana and Respondents-Appellees-Plaintiffs Jerry Goza and Gladys P. Goza.

Defendants below: Parish of West Baton Rouge was dismissed on Motion for Summary Judgment and ABC Insurance Company never filed an appearance.

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CITATIONS OF THE REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

Petitioner seeks a writ of certiorari to review the Judgment of the State of Louisiana First Circuit Court of Appeal, holding the provisions of 23 U.S.C. §409 inapplicable to Louisiana's uniform motor vehicle accident reports, which reports are designed and compiled in major part, with federal highway safety funds by the Louisiana Department of Transportation and Development pursuant to the mandate of §152 of 23 U.S.C. The Supreme Court of the State of Louisiana has, with dissent, refused to review the decision.

The appellate decision is reported at 21 So. 3d 320, 2008-0086 (La. App. 1 Cir. 5/5/09). *Writ Denied by: Goza v. Parish of West Baton Rouge*, 23 So.3d 919, 2009-2146 (La. 12/11/09) (NO. 2009-C-2146). Judgment of the Trial Court was rendered April 10, 2007; Judgment on JNOV: September 4, 2007.

JURISDICTION

The Supreme Court of the State of Louisiana denied defendant's application for writs of certiorari and/or review December 11, 2009. This court has jurisdiction under 28 U.S.C. 28 §1257(a).

STATUTORY PROVISIONS INVOLVED

23 U.S.C. §409
23 U.S.C. §152[1]
La. R.S. 32:398
La. C.E. art. 803
La. C.E. art. 703

23 U.S.C. §409 states:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed at such reports, surveys, schedules, lists or data.

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[1] The full text of this statute, of La R.S. 32:398, L.A. C.E. articles 803 and 703 are given in the appendix to this application.

STATEMENT OF THE CASE

The plaintiff, intoxicated motorist Jerry Goza, lost control of his vehicle on a two-lane Louisiana highway after a Mardi-Gras celebration the 11th of February 1996. Mr. Goza overturned his Toyota Tercel in a roadside ditch adjoining a sugarcane field in rural Iberville parish and was gravely injured. His then wife, plaintiff Gladys Goza, had remained at a neighborhood tavern where the couple had been celebrating the Mardi-Gras holiday and was unaware of her husband's departure from the tavern.

In prosecution of their civil claim against the State of Louisiana Department of Transportation and Development Mr. and Mrs. Goza obtained from local law enforcement agencies five Louisiana uniform motor vehicle accident reports[2] involving motor vehicle crashes on Louisiana highway 989-1, spanning a number of years. The Goza's introduced and used these reports during the trial of this matter to establish the state highway's allegedly defective nature and the Transportation Department's foreknowledge thereof. [APPELLATE RECORD VOLUME 7 PAGES 1429-1430].

Prior to trial of the matter, the State of Louisiana Department of Transportation and Development filed a motion *in limine* to exclude the use of those accident reports as privileged data under the provisions of 23 U.S.C. §409, and as well, as ordinary hearsay

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[2] The trial court and plaintiffs' expert both erroneously referred to seven reports, including the report on Goza's accident. There were five, excluding Goza's, spread out over nine years.

documents under Louisiana Code of Evidence Article 803.

One day prior to trial, the trial court denied the motion[3], specifically ruing the provisions of 23 U.S.C. §409 inapplicable to the accident reports.

> "The remaining issue is the exception---the Motion in Limine in regard to the accident reports under 409 and 402. I still, in this day and time we tend to forget what we are here in this court to determine and that's to determine what happened and why. And it gets more and more that we don't want the judge or jury to know what the true facts are because of many exclusions and the like. I do not believe the intent of 409 is as broad as it has attempted to be developed by the state to the point that virtually anything that shows what occurred at the time is no longer under their terms admissible because we use it to do studies with it. I don't believe that was the intent of Congress. I just do not believe that. We had uniform accident--- not only accident reports but we had uniform accident reports developed by the state of Louisiana long before 409 was even in existence and being used to develop all sorts of data and even just for the officers to testify as to what happened at the time. I do not

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[3] In spite of the plain provisions of Louisiana Code of Evidence Art. 803 the trial court eventually allowed introduction of the accident reports into evidence as exhibits over the 'hearsay' objections of the State of Louisiana; the appellate court characterized the matter "harmless error". *Goza v. Parish of West Baton Rouge*, 21 So. 3rd at 328-329.

believe the reports in and of themselves are inadmissible. I don't think that these files that you have over there that huh, that contain reports or even the results of your surveys and your final conclusions and all that, that's covered by 409, I truly believe that. I don't necessarily agree with it, okay, but I agree that it's not admissible and not discoverable. You know, it bothers me that the State can get these reports, make this data but there's no teeth in it after saying that once you discover something then you must fix it. There's no must there. After you do it you can take it and put it in your files somewheres [sic] and forget about it and no one gets to see it unless they go prove it otherwise. Congress needs to think about that sometimes when they pass these things. I don't mind them doing it, but they ought to put some teeth that if you find something wrong you ought to be required to fix it or it becomes public or whatever, I don't know. But anyway, that's beyond what this motion is. This is on the accident reports themselves. If they meet admissibility for other reasons, they are not inadmissible if, huh, in regard to the 409/402 issue, all right."
[APPELLATE RECORD VOLUME 6, PAGES 1158-1160]

In making this determination the district court simply eschewed *in limine* testimony establishing that the Uniform Motor Vehicle Accident Reports were designed and compiled under the aegis of Louisiana's Highway Safety Improvement Program (*HSIP*). Nevertheless, this testimony was generally accepted by the trial and appellate court as factual. Hadi Shirazi,

the Louisiana Department of Transportation and Development Hazard Elimination Funds Coordinator testified that the crash report design and compilation processes are funded with federal safety funds Louisiana receives under §152 of 23 U.S.C. and that the reports are an essential part of the state's main §152 safety program. [APPELLATE TRANSCRIPT RECORD Vol. 6, pages 1129-1132]

According the Shirizi, the law enforcement officers who fill out the uniform motor vehicle reports are trained to do so with federal safety funds and all investigators in Louisiana use that same report; the uniformity of the report is a product of the safety program. [APPELLATE TRANSCRIPT RECORD Vol. 6, page 1130] Compilation of the Louisiana uniform motor vehicle accident report is a main foundation for *HSIP* funding in Louisiana, and is specifically funded by money provided through §152, 402 and 409.

> A. Because, again, crash reports is [sic] one of our main foundations of the highway safety improvement program in order to get 152 and 133 funding.
>
> Q. And what type of funds pay for the development of the uniform crash reports?
>
> A. 402 and 409.
>
> [APPELLATE RECORD Vol. 6, page 1132]

Since 1969 federal safety funds have been used to modify the form of Louisiana crash reports for the purpose of highway safety improvement programs. [APPELLATE RECORD Vol. 6 Pages 1134-1135]

In spite of all this testimony regarding §152 federal safety funding directed to the design and compilation

of the reports, and in fact, seeming to accept it as factual, the court found, as the district court states above, that long standing state law enforcement investigative duties requiring the compilation of motor vehicle accident reports under Louisiana statute La. R.S. 32:398 precluded application of the federal evidentiary privilege. The appellate court states: "*As discussed hereafter, we hold that there has been no such showing [of privilege] regarding the accident reports at issue.* Goza v. Parish of West Baton Rouge, 21 So 3rd 320 at 327, 2008-0086 (La. App. 1 Cir. 5/5/09)

The Louisiana First Circuit Court states:

> "While the DOTD created the accident report form and trains local law enforcement officers to properly complete the form to fulfill its obligations under 23 U.S.C. § 152, the information added to the form by law enforcement is compiled and collected pursuant to their statutory duty to investigate and report accidents. It is that information compiled by law enforcement pursuant to its statutory duty that the DOTD seeks to exclude in this matter."
>
> "To support its assertion that the accident reports were "compiled and collected ... for the purpose of developing any highway safety construction improvement project, which may be implemented utilizing Federal-aid highway funds," the DOTD introduced the testimony of Hadid Shirazi, a traffic engineer and Hazard Elimination Funds coordinator for the DOTD. Mr. Shirazi related how the accident reporting form used by local law enforcement officials to record accident information is a uniform

document developed by the DOTD to be used by all law enforcement agencies in the state at all levels of government. Furthermore, Mr. Shirazi testified that federal highway safety funds were and continue to be used to revise the accident reporting form and to train law enforcement officers how to properly complete the form."

"Mr. Shirazi's testimony establishes that the forms designed by the DOTD made it more convenient for the agency to glean information from the accident reports, but it does not negate the general duty on the part of law enforcement to investigate and report accidents, as required by statute. *See* La. R.S. 32:398. To the extent that law enforcement accommodates the DOTD by adopting the uniform accident report forms designed by the DOTD for use in accident investigation, such action alone is insufficient to transform the normal accident investigation duties of local law enforcement agencies into an act of "information compilation and collection for § 152 purposes." As such, we find no merit in the DOTD's argument that the mere completion of the form designed by the DOTD, and completed in accordance with training provided by the DOTD, makes the completion of an accident report by local law enforcement officials an act of compiling or collecting information for § 152 purposes."
Goza v. Parish of West Baton Rouge, 21 So 3rd 320 at 328, 2008-0086 (La. App. 1 Cir. 5/5/09)

This ruling, which holds that there is no application of the privilege under §409 regarding Louisiana's uniform motor vehicle accident reports, was

specifically subject of the application for writs of certiorari to the Louisiana Supreme Court, as applicant's assignment of error #3: *IN RE: Louisiana State of et al.; Transportation and Development Dept. of;- Defendant(s); Applying for Writs of Certiorari and/or Review, Parish of W. Baton Rouge, 18th Judicial District Court Div. D. No. 28, 196; to the Court of Appeal, First Circuit, No 2009-C-2146; Writ Denied by:* Goza v. Parish of West Baton Rouge, 23 So.3d 919, 2009-2146 (La. 12/11/09) (NO. 2009-C-2146).

Thus, according to reported case law, Louisiana's uniform motor vehicle accident reports are subject to discovery and admissible into evidence and may be considered for any purposes in an action for damages arising from any occurrence at a location on a state highway, in spite of their design, funding and compilation using federal safety dollars and unquestioned centrality to Louisiana's Highway Safety Improvement Program under §152 of Title 23 of the United States Code--- the language of the federal statute, 23 U.S.C. §409, notwithstanding.

REASONS FOR GRANTING THE PETITION

Congress has determined that highway hazards data gathered by state highway departments pursuant to 23 U.S.C. §152 shall not be used in civil tort suits in state or federal courts. Testimony in this case has established that Louisiana uniform motor vehicle accident reports are designed and compiled under this mandate using §152 funds and, remarkably, the state courts have accepted this as factual, yet they conclude that under state law the general duty to investigate accidents precludes any application of the federal privilege against using the reports in tort suits. *Goza*

v. Parish of West Baton Rouge, 21 So. 3rd 320 at 328 (La. App. 1 Cir. 2009); Writ Denied *by:* Goza v. Parish of West Baton Rouge, 23 So.3d 919, 2009-2146 (La. 12/11/09) (NO. 2009-C-2146)

The testimony of Hadi Shirizi[4] the hazard elimination funds coordinator for the highway safety improvement program of the Louisiana Department of Transportation and Development unquestionably established that the Louisiana uniform motor vehicle accident reports are creatures of the HSIP program, funded with §152 funds and directed to §152 goals.

> A. My office is basically work with 152 program regarding all the highway safety improvements using data that is compiled from the crash reports, which is most--- part of crash report is, part of a crash report is designed in order to collect the data for providing and getting the 152 programs. And my office was solely responsible for gathering those data from the crash reports.
> Q. And how does your office gather this data from the crash reports?
> A. The crash reports - first of all we designed the form using the 402 and 152 program part of 409.
> Q. You designed the—
> A. Designed the complete form.
> Q. The crash reports form?
> A. Crash reports form, uniform motor vehicle crash report system, it helps our Highway

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[4] Hadi Shirazi P.E , is a nationalized Iranian and speaks with grammar somewhat idiomatic of his native tongue.

Safety Commission, which Colonel Champaign is involved in this scenario. We put all the elements together, see what all those elements needed in order to do a better investigation and better requirement to getting 152 funds on those crash reports.

Q. And this is a cooperative effort between DOTD and the Highway safety Commission?

A. Yes.

Mr. Palmintier:

Object to the leading question.

THE COURT: Sustained.

CONTINUING EXAMINATION BY MS. MCKENZIE:

Q. And describe how the data is obtained by DOTD.

A. Basically we train all the investigation officers; it can be a state police, a city police and sheriff in order to, we learn how to use the uniform crash reports. When they train and learn how to do it, basically, we go ahead and put a class together, you give them a manual in order to use this manual to fill out this crash report correctly and explain to them why this crash report is so important for DOTD in order to getting the fund for 152.

Q. And the officers that complete the form, are they--- are all the officers in the state required to complete the same form?

A. Every investigation officer on crash scene use the same form, that's the reason why we call it uniform motor vehicle crash report.

Q. Does that include parishes?

A. Every parish, every sheriff office, every city police and every state police has to fill out the same form. Basically, we sit down every quarter

with this group of people, we call it traffic record forum in order to design this form and basically evolve it as we go, make it better and more efficient for DOTD purpose, for highway safety improvement.

Q. And the officers who complete these forms, are they trained to complete them?

A. Yes. They're well trained through Highway Safety Commission, part of it through DOTD.

Q. And is there a manual?

A. There is a manual outside that we put out every other year; we modify the manual in order to make it easier and more effective to fill out the crash report.

Q. And what is the name of that manual?

A. It's basically Manual for Crash Reporting System.

Q. Okay. Is that the technical name for it?

A. There's not a technical name for it, basically give a technical name for it but when we put the manual together we call it Highway Safety for Motor – Meaningful Motor Vehicle Crash Reporting System.

Q. Okay. Does DOTD participate in the development of these uniform crash reports?

A. We have to participate because not only we paying for it in order to put those elements in those crash reports for our highway safety improvement program but also we want to make sure the elements fill out correctly in order to, for us to go back and do the survey and analyze the data in order to see what other improvements we need to do. Because, again, crash reports is one of our main foundations of the highway safety improvement program in order to get 152 and 133 funding.

[APPELLATE RECORD Vol. 6 Pages, 1129-1132]

Yet the Louisiana First Circuit Court characterizes all this as merely a 'convenience' for the benefit Louisiana DOTD:

> "While the DOTD created the accident report form and trains local law enforcement officers to properly complete the form to fulfill its obligations under 23 U.S.C. § 152, the information added to the form by law enforcement is compiled and collected pursuant to their statutory duty to investigate and report accidents. It is that information compiled by law enforcement pursuant to its statutory duty that the DOTD seeks to exclude in this matter."

> "To support its assertion that the accident reports were 'compiled and collected ... for the purpose of developing any highway safety construction improvement project, which may be implemented utilizing Federal-aid highway funds,' the DOTD introduced the testimony of Hadid Shirazi, a traffic engineer and Hazard Elimination Funds coordinator for the DOTD. Mr. Shirazi related how the accident reporting form used by local law enforcement officials to record accident information is a uniform document developed by the DOTD to be used by all law enforcement agencies in the state at all levels of government. Furthermore, Mr. Shirazi testified that federal highway safety funds were and continue to be used to revise the accident reporting form and to train law enforcement officers how to properly complete the form."

> "Mr. Shirazi's testimony establishes that the forms designed by the DOTD made it more convenient for the agency to glean information from the accident reports, but it does not negate the general duty on the part of law enforcement to investigate and report accidents, as required by statute. *See* La. R.S. 32:398. To the extent that law enforcement accommodates the DOTD by adopting the uniform accident report forms designed by the DOTD for use in accident investigation, such action alone is insufficient to transform the normal accident investigation duties of local law enforcement agencies into an act of "information compilation and collection for § 152 purposes." As such, we find no merit in the DOTD's argument that the mere completion of the form designed by the DOTD, and completed in accordance with training provided by the DOTD, makes the completion of an accident report by local law enforcement officials an act of compiling or collecting information for § 152 purposes."
> Goza v. Parish of West Baton Rouge, 21 So 3rd 320 at 328, 2008-0086 (La. App. 1 Cir. 5/5/09)

To describe the uniform motor vehicle accident reports at issue as originally and solely compiled for non-§152 purposes, given over to the DOTD as a "convenience" by local law enforcement officers is indeed a shocking mischaracterization of Shirazi's testimony. And there can be no doubt that the plaintiffs' made their case based on the data contained in these reports. The plaintiffs' civil engineering expert John Bates premised the heart of his opinion on the ostensibly privileged reports:

Q. You were saying that DOTD, the defendant in this case receives these accident reports?
A. They receive the accident reports, they tabulate them into various statistical information that is important to the highway engineers to analyze. And in a trial just down the road here in Plaquemine a couple of months ago, district traffic engineer for DOTD Ronnie Carter said that within six months after a traffic report is prepared by the troopers that are available to people like him, the district traffic engineers for this area for DOTD.
Q. All right, sir.
A. So the date is available, but the testimony has been that nobody was looking at the accident reports.
Q. All right. Bear with me just a moment. One of the aspects of proof, one of the things that we have to show on behalf of Jerry is that the defendant know [sic] about this dangerous curve. And tell the jury what you know from an engineering standpoint that dovetails with what you just said about what the DOTD should have known and actually knew about this curve.
A. Okay, DOTD had notice of the defects. First of all, accidents that are similar to Mr. Goza's, including Mr. Goza's seven accidents that I have had access to---I normally do not have access but those are ones that I was able to obtain and analyzing those they're all the same as Mr. Goza's in that they were going westbound, they lost control, they landed up in the same ditch that he did and huh, that's where things---so accident reports were available to DOTD but they did nothing about it.

[APPELLATE RECORD VOLUME 7 PAGES 1429-1430]

It is most noteworthy that state revised statute La. R.S. 32:398, which is the authority adversely sited by the court as the rationale and basis for its finding that Louisiana uniform motor vehicle accident reports are **not** compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, thus justifying allowance of Mr. Bate's testimony, states, in paragraph (J):

> (J). The Department of Public Safety shall receive accident reports required to be made by this Section and may tabulate and analyze such reports and publish annually, or at more frequent intervals, statistical information based thereon as to the number, cause, and location of highway accidents. Based upon its findings after analysis, the Department of Public Safety may conduct further necessary detailed research to determine more fully the cause and control of highway accidents. It may further conduct experimental field tests within areas in the state from time to time to prove the practicality of various ideas advanced in traffic control and accident prevention.

Thus it is argued here that there is no proper legal rationale which explains the premise underlying the district and appellate court's ruling---that the congressional will as expressed in 23 U.S.C. §409 to keep certain types of highway safety data compiled or collected by the states pursuant to §152 from being used against them in tort suits, *eviscerates* the

coexistent local law enforcement duty to investigate accidents and compile reports generally, or more pointedly, that concomitant, state and local law enforcement duties can essentially preclude application of the congressionally mandated privilege under 23 U.S.C. §409, because the local law enforcement duties encompass, in the epistemological matrix of accident information gathering, some of the same information. The federally funded reports which Louisiana's Highway Safety Improvement Program [HSIP] funds coordinator testified are *"one of our main foundations of the highway safety improvement program..."* are now fair game against Louisiana in its civil courts. Highway safety experts testifying for litigants, as shown here, will weave the data of the uniform motor vehicle accident report into their reports and opinions and it is immaterial that the reports themselves may be hearsay under Louisiana Code of Evidence Art. 803(8)(b)(i) since, in Louisiana under L.C.E. Art. 703, as generally elsewhere, experts may rely on hearsay as a basis of opinion or inference.

Although this decision directly contravenes the privilege established under the federal statue, Louisiana's high court has refused, with two dissents, to review the decision. This places Louisiana law as stated in *Goza* directly in conflict with the law set out in the United States Supreme Court's opinion of *Pierce County, Washington v. Guillen*, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003). In that case, the United States Supreme Court declared:

> "§ 409 protects all reports, surveys, schedules, lists, or data actually compiled *or* collected for § 152 purposes, but does not protect information that was **originally** *[emphasis not in original]*

> compiled or collected for purposes unrelated to § 152 and that is currently held by the agencies that compiled or collected it, even if the information was at some point "collected" by another agency for § 152 purposes. Brief for United States 28-36. Respondents concede that this is a defensible reading of the statute. Brief for Respondents 23-24, 25. Under this interpretation, an accident report collected **only** *[emphasis not in original]* for law enforcement purposes and held by the county sheriff would not be protected under § 409 in the hands of the county sheriff, even though that same report would be protected in the hands of the Public Works Department, so long as the department first obtained the report for § 152 . We agree with the government's interpretation of the statute."

It is clear from the published appellate opinion in *Goza* that Louisiana courts have given a primacy to the traditional state/local law enforcement investigative duty which is not supported in the state statue cited---indeed the testimony of Shirizi and the very language of the state statue makes it clear that the reports are originally, functionally driven by the § 152 mandate. *Pierce County* does not provide a rationale for the finding that highway hazards data gathered under the auspices of § 152 may be used in tort suits against the states simply because there exists a concomitant, somewhat overlapping local law enforcement duty to investigate traffic mishaps, which as an epistemological function, must necessarily encompass some of the same data.

The Louisiana Department of Transportation and Development's motion *in limine* did not, after all, seek to exclude the testimony of law enforcement officers regarding their investigations of allegedly similar accidents on Louisiana highway 989-1 or shroud by privilege any police officer's or witnesses' *first-hand knowledge* of an investigated accident's facts and circumstances. It only sought to prevent uniform motor vehicle accident reports *specifically designed, honed and financed to gather data pursuant to § 152,* which were already *inadmissible* hearsay under Louisiana evidentiary law, from being explicitly used against it in a civil law suit over the highway's alleged dangerousness.

The fact that, in this instance, the appellate court later ruled the actual introduction of the reports as trial exhibits, to be "harmless error" in violation of La. Code of Evidence Art. 803, is of no moment. The federally funded data which is central to Louisiana's highway safety improvement program is now 'fair game' in its civil courts. It could not be more clear from a plain reading of the statute cited by the appellate court and the un-contradicted testimony of the § 152 hazards fund coordinator, that the data compiled in a Louisiana uniform motor vehicle accident report is not "originally" gathered "solely" for law enforcement purposes unrelated to § 152.

Moreover, rather than bring the law enforcement officers and individuals implicated by the reports at issue into court to testify, as was their right, the litigants choose to treat the reports as direct or *prima facie* evidence of a highway defect, and in fact were greatly encouraged in this tactic by the district and appellate courts, exactly as the congressional statute

forbids. The trial court offered this rationale regarding its ruling:

> "You know, it bothers me that the State can get these reports, make this data but there's no teeth in it after saying that once you discover something then you must fix it. There's no must there. After you do it you can take it and put it in your files somewheres [sic] and forget about it and no one gets to see it unless they go prove it otherwise. Congress needs to think about that sometimes when they pass these things. I don't mind them doing it, but they ought to put some teeth that if you find something wrong you ought to be required to fix it or it becomes public or whatever, I don't know. But anyway, that's beyond what this motion is. This is on the accident reports themselves. If they meet admissibility for other reasons, they are not inadmissible if, huh, in regard to the 409/402 issue, all right."
> [APPELLATE RECORD VOLUME 6, PAGES 1158-59]

Supreme Court Rule 14 paragraph 3 states quite plainly "*A petition for writ of certiorari should be stated briefly and in plain terms*". Keeping that admonition in mind, it is fair to state, speaking colloquially, that it is not difficult to connect the dots in this matter. The appellate opinion accepts as factual the use of § 152 "Hazard Elimination Program" funds in the design of the accident reports used to establish liability against the Louisiana Department of Transportation and Development, and in the training of law enforcement personnel regarding the reports' proper compilation. The Court notes that as a result of

the § 152 funding the reports are a uniform tool used state-wide at all levels of law enforcement and government, and even the state revised statute cited adversely by the appellate court plainly connotes the reports' role in "*detailed research to determine more fully the cause and control of highway accidents*", thus they are not merely, solely, or originally law enforcement reports confected pursuant to traditional, individual investigations of traffic mishaps, as the Louisiana First Circuit Opinion would have it. The reports are specifically and in the first instance, tools, *not mere forms*, for gathering highway hazards information, originally dedicated to § 152 funding and research. The court's dismissive designation of the uniform motor vehicle accident reports as simple "forms" given over to Highway Department as a convenience, short-circuits serious consideration of the controversy and is the antithesis of bona fide legal analysis.

The primacy assigned to local law enforcement duties by the court is not only misplaced given the actual language of La. R.S. 32:398, but given the crash reports' essential and original focus under §152, the decision implicates the Supremacy Clause of the Federal Constitution, which states in its second paragraph: *This Constitution and the Laws of the United States which shall be made, under the Authority of the United States, shall be supreme Law of the Land, and the Judges in every State shall be bound thereby, any thing in the Constitution of Laws of any State to the Contrary notwithstanding.*"

The *Goza* decision holds that, even under an evidentiary showing indicating that the accident reports are driven and directed by § 152 funding and

goals, traditional state and local law enforcement investigative duties preclude application of the privilege established under 23 U.S.C. § 409, merely because, chronologically, the local law enforcement duty to confect generic accident reports predated the implementation of § 409.

The argument that accident reports are not protected under the federal statute because generic accident reports have been collected by state law enforcement authorities for many years prior the adoption by Congress of § 409 and have other functions, has been previously rejected in *Coniker v. State of New York*, 695 N.Y.S. 2d 492 (N.Y.Ct.Cl.7/26/99). See also similar treatment of similar arguments: *Lusby v. Union Pac. R. Co.*, 4 F.3d 639, 641, (8th Cir. 1993); *Robertson v. Union Pac. R. Co.* 954 F.2d 1433 (9th Cir. 1992), *Powers v. CSX Tansp., Inc.*, 177 F. Supp. 2d 1276 (S.D. Ala. 2001); *Taylor v. St. Louis Southwestern Ry. Co.* 746 F. Supp. 50 (D. Kansas 1990) and *Mackie v. Grand Truck W. R.R. Co.*, 544 N.W.2d 709, 711 (Mich.App. 1995).

CONCLUSION

The *Goza* Opinion specifically states: "...we *hold* that there has been no such showing [of § 409 privilege] regarding the accident reports at issue." Given the testimony and facts of the case, accepted by the court as factual, though eschewed, the reported decision itself provides the reasons for granting this petition.

Respectfully submitted,

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APPENDIX A

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 2008 CA 0086

[Filed May 5, 2009]

JERRY GOZA AND GLADYS P. GOZA	)
	)
VERSUS	)
	)
PARISH OF WEST BATON ROUGE, STATE OF LOUISIANA AND ABC INSURANCE COMPANY	)

Judgment Rendered: May – 5 2009

* * * * * *

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of West Baton Rouge
State of Louisiana
Suit Number 28,196

Honorable William C. Dupont, Judge

* * * * * *

Michael C. Palmintier Baton Rouge, LA	Counsel for Plaintiffs/Appellees Jerry and Gladys P. Goza
James D. "Buddy" Caldwell *Attorney General* John H. Ayres, III *Assistant Attorney General* Baton Rouge, LA	Counsel for Defendant/Appellant Louisiana Department of Transportation and Development.

* * * * * *

BEFORE: GUIDRY, GAIDRY, AND WELCH, JJ.

GUIDRY, J.

The State of Louisiana, through the Department of Transportation and Development (DOTD), appeals a jury verdict and a judgment notwithstanding the verdict (JNOV) rendered in this matter. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On February 11, 1996, Jerry Goza attended a Mardi Gras parade with his wife, Gladys P. Goza, in Addis, Louisiana, where he consumed at least one or two beers. Following the parade, Mr. Goza and his wife went to Marley Marina, a local bar, where they danced and socialized with friends, some of whom had attended the same Mardi Gras parade. Around 7:45 p.m. that night, Mr. Goza, who had previously left the bar in his wife's car, was traveling westbound on

Louisiana Highway 989-1 (a state-owned highway commonly known as Choctaw Road) on his way back to Marley Marina, when he traveled off the paved roadway at the juncture where Louisiana Highway 989-1 intersected at a sharp curve with Louisiana Highway 989-2 (commonly known as Ellwood Road). Mr. Goza drove off the roadway into a cane field adjacent to the road where his vehicle eventually ran into a ditch, struck a culvert, and flipped over. Mr. Goza sustained serious injuries, requiring surgery and rehabilitative treatment.

The Gozas filed a petition for damages against the DOTD and the Parish of West Baton Rouge, alleging that the design, construction, and signage of Louisiana Highway 989-1 were defective, but they later filed a motion to dismiss their claims against the Parish of West Baton Rouge. A "Restrictive Judgment of Dismissal" was signed by the trial court on April 3, 1997, dismissing the Parish of West Baton Rouge from the suit.

The remaining defendant, the DOTD, answered the petition generally denying liability for the plaintiffs' claims; however, after a period of extensive discovery and other pre-trial proceedings, the DOTD amended its answer to add a third-party demand against the Parish of West Baton Rouge. In the third-party demand, the DOTD alleged that portions of the location on which the accident occurred were maintained and controlled by the Parish of West Baton Rouge. The West Baton Rouge Parish Council answered the third-party demand to deny the allegations of liability asserted against it.

Thereafter, the West Baton Rouge Parish Council, which observed that it had been wrongfully identified in prior pleadings as the Parish of West Baton Rouge, filed a motion for summary judgment, alleging there was no evidentiary basis on which the West Baton Rouge Parish Council could be held liable. The trial court agreed, and rendered summary judgment in favor of the West Baton Rouge Parish Council, dismissing the DOTD's third-party demand. The DOTD appealed the summary judgment, which judgment was affirmed by this court on review, Goza v. Parish of West Baton Rouge, 05-1040 (La. App. 1st Cir. 5/5/06), 930 So.2d 1243(unpublished opinion), and a subsequent writ application to the supreme court was denied. Goza v. Parish of West Baton Rouge, 06-1221 (La. 6/14/06), 929 So.2d 1272.

The matter thus proceeded to trial in October 2006 against the DOTD alone. Following a four-day jury trial, the jury rendered a verdict in favor of the plaintiffs, but allocated only 25 percent fault to the DOTD. The jury awarded Mr. Goza the following amounts:

Loss of enjoyment of life and permanent disability	$100,000.00
Future medical expenses	$500,000.00
Past medical expenses	$326,001.81
Lost wages, past and future	$678,195.00

The jury did not award Mr. Goza any other general damages. The jury awarded Mrs. Goza $100,000.00 for loss of consortium.

In response to the jury's verdict, the DOTD filed a motion for JNOV. The trial court granted the motion in part and amended the jury's verdict to award Mr. Goza $600,000.00 in general damages and to decrease the award of future medical expenses to $150,000.00. In all other respects, the trial court maintained the awards and the fault allocations rendered by the jury. The DOTD appeals the original jury verdict and the JNOV.

ASSIGNMENTS OF ERROR

In this appeal, the DOTD contends that the trial court committed error in admitting uniform motor vehicle accident reports, which it attempted to exclude pursuant to a motion in limine that was denied by the trial court, and in restricting its ability and right to present evidence opposing the accident reports. The DOTD further contends that it was error to apportion any fault to it and to award Mr. Goza future medical expenses.

DISCUSSION

We began our review of this appeal by first considering the DOTD's third assignment of error relative to the trial court's denial of its motion in limine to exclude from evidence the Uniform Motor Vehicle Accident Reports (accident reports) that the plaintiff obtained from the West Baton Rouge Parish Sheriff's Office. Relying on 23 U.S.C. § 409 and Long v. State, Department of Transportation and Development, 04-0485 (La. 6/29/05), 916 So.2d 87, the DOTD contends that the trial court erred in allowing the plaintiff to introduce copies of the accident reports at trial.

The federal statute, 23 U.S.C. § 409, was enacted by Congress "to prevent the unauthorized disclosure of information that States compile in good faith to meet the purposes of Federal aid highway programs to eliminate or reduce hazardous roadway conditions." Long, 04-0485 at 10-11, 916 So.2d at 94-95. Accordingly, the statute provides:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

The definitive pronouncement of the proper scope and application of 23 U.S.C. § 409 is found in the United States Supreme Court's opinion of Pierce County, Washington v. Guillen, 537 U.S. 129, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003). In that case, the United States Supreme Court declared:

> § 409 protects not just the information an agency generates, *i.e.*, compiles, for § 152[1] purposes, but also any information that an agency collects from other sources for § 152 purposes. And, it also takes a narrower view of the privilege by making it inapplicable to information compiled or collected for purposes unrelated to § 152 ***and*** held by agencies that are not pursuing § 152 objectives. We therefore adopt this interpretation.

Guillen, 537 U.S. at 145-46, 123 S.Ct. at 730-31 (emphasis added).

Evidentiary privileges are in derogation of the search for truth and thus such privileges must be strictly construed. Sevario v. State, Department of Transportation and Development, 98-1302, p. 10 (La. App. 1st Cir. 11/10/99), 752 So.2d 221, 229, writ denied, 99-3457 (La. 4/7/00), 759 So.2d 760, and writs not considered, 99-3638, 00-0044 (La. 4/7/00), 759 So.2d 81, 82.

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[1] The "§ 152" referred to is 23 U.S.C. § 152, titled "Hazard elimination program," which provides in pertinent part:

> Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

23 U.S.C. § 152(a)(1).

In Long, the issue before the court was whether the trial court erred in admitting into evidence three letters between the DOTD and the mayor of Boutain that were obtained from the mayor's office. The DOTD argued that the letters should have been held inadmissible pursuant to 23 U.S.C. § 409. Long, 04-0485 at 13, 916 So.2d at 96. The court in Long agreed, finding that the "three letters represent information necessary for the commencement of the upgrade [of the] roadway/railroad crossing, and thus, the letters effectuate the purpose of the federal safety program." Long, 04-0485 at 20, 916 So.2d at 100. The court therefore held that the letters were "protected from discovery and ... inadmissible under 23 U.S.C. § 409[,]" even though the letters were in the hands of an agency not charged with the responsibility of developing highway safety construction improvement projects that utilize Federal-aid highway funds. Long, 04-0485 at 20, 916 So.2d at 100.

We find the Long case distinguishable from the matter before us. The court in Long expressly found that the letters in that case "were compiled and collected by the DOTD for purposes related to funding through ... a federal safety program[,]" because each of the letters specifically addressed the commencement of the process of selecting the roadway/railway crossing for improvement. Long, 04-0485 at 19-20, 916 So.2d at 99-100. As discussed hereafter, we hold that there has been no such showing regarding the accident reports at issue.

The Louisiana Supreme Court specifically held in Long that "[t]he privilege afforded to state agencies in § 409 and the documents at issue must not be viewed in a vacuum; rather, inquiry should be directed toward

the purpose for which the documents are created." Long, 04-0485 at 20, 916 So.2d at 100. While the DOTD created the accident report form and trains local law enforcement officers to properly complete the form to fulfill its obligations under 23 U.S.C. § 152, the information added to the form by law enforcement is compiled and collected pursuant to their statutory duty to investigate and report accidents. It is that information compiled by law enforcement pursuant to its statutory duty that the DOTD seeks to exclude in this matter.

To support its assertion that the accident reports were "compiled and collected ... for the purpose of developing any highway safety construction improvement project, which may be implemented utilizing Federal-aid highway funds," the DOTD introduced the testimony of Hadid Shirazi, a traffic engineer and Hazard Elimination Funds coordinator for the DOTD. Mr. Shirazi related how the accident reporting form used by local law enforcement officials to record accident information is a uniform document developed by the DOTD to be used by all law enforcement agencies in the state at all levels of government. Furthermore, Mr. Shirazi testified that federal highway safety funds were and continue to be used to revise the accident reporting form and to train law enforcement officers how to properly complete the form.

Mr. Shirazi's testimony establishes that the forms designed by the DOTD made it more convenient for the agency to glean information from the accident reports, but it does not negate the general duty on the part of law enforcement to investigate and report accidents, as required by statute. See La. R.S. 32:398. To the extent

that law enforcement accommodates the DOTD by adopting the uniform accident report forms designed by the DOTD for use in accident investigation, such action alone is insufficient to transform the normal accident investigation duties of local law enforcement agencies into an act of "information compilation and collection for § 152 purposes." As such, we find no merit in the DOTD's argument that the mere completion of the form designed by the DOTD, and completed in accordance with training provided by the DOTD, makes the completion of an accident report by local law enforcement officials an act of compiling or collecting information for § 152 purposes.

As observed by the Court in Guillen:

> [T]he text of § 409 evinces no intent to make plaintiffs worse off than they would have been had § 152 funding never existed. Put differently, there is no reason to interpret § 409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to § 152, held by government agencies not involved in administering § 152, if, before § 152 was adopted, plaintiffs would have been free to obtain such information from those very agencies.

Guillen, 537 U.S. at 146, 123 S.Ct. at 731. We therefore conclude that the trial court properly determined that the accident reports in the possession of the West Baton Rouge Parish Sheriff's Office were not "compiled or collected" for purposes of 23 U.S.C. § 152, and thus were not subject to exclusion from evidence on the basis of 23 U.S.C. § 409.

We find, however, that the trial court did err in denying the DOTD's motion in limine on the basis of La. C.E. art. 803. That article provides, in pertinent part:

> **Art. 803. Hearsay exceptions; availability of declarant immaterial**
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ...
>
> (b) Except as specifically provided otherwise by legislation, the following are **excluded from this exception** to the hearsay rule:
>
> (i) Investigative reports by police and other law enforcement personnel. [Emphasis added.]

Hence, the accident reports introduced by the plaintiffs at trial are considered hearsay evidence, and therefore should have been considered inadmissible, see La. C.E. art. 802; however, for the following reasons, we find the trial court's error in admitting the accident reports was harmless. See Ross v. Noble, 442 So.2d 1180, 1184 (La. App. 1st Cir. 1983).

Generally, when liability is premised on the DOTD's ownership of an allegedly defective thing, a plaintiff may recover damages from the DOTD, a public entity, based on La. C.C. art. 2317, as limited by La. R.S. 9:2800. The portion of La. R.S. 9:2800

pertinent to the DOTD's liability, as the statute provided at the time of Mr. Goza's accident,[2] stated:

> B. ... [N]o person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.
>
> C. Constructive notice shall mean the existence of facts which infer actual knowledge.
>
> D. A violation of the rules and regulations promulgated by a public entity is not negligence per se.
>
> E. "Public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions. Public entity also includes housing authorities, as defined in R.S. 40:382(1), and their

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[2] The statute has since been amended by 2003 La. Acts, No. 725, § 1, 2003 La. Acts, No. 1077, § 1, effective July 2, 2003; and 2006 La. Acts, No. 545, § 1.

> commissioners and other officers and employees.

Thus, in order to find the DOTD liable, the plaintiffs had to prove (1) the DOTD had custody of the thing that caused the plaintiffs' damages; (2) the thing was defective because it had a condition that created an unreasonable risk of harm; (3) the DOTD had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time; and (4) the defect was a cause-in-fact of the plaintiffs' injuries. Cormier v. Comeaux, 98-2378, pp. 5-6 (La.7/7/99), 748 So.2d 1123, 1127.

Under La. R.S. 9:2800, constructive notice is defined as the existence of facts which imply actual knowledge, and this definition allows a person to infer actual knowledge on the part of a public entity when the facts demonstrate that the defective condition existed for such a period of time that the defect should have been discovered and repaired. Morris v. State, Department of Transportation, 94-2545, p. 6 (La. App. 1st Cir. 10/6/95), 664 So.2d 1192, 1196, writ denied, 95-2982 (La. 2/9/96), 667 So.2d 537. While the DOTD cannot be imputed with knowledge of every defect on its roadways and shoulders, neither can the DOTD escape liability by negligently failing to discover that which is easily discoverable. Brown v. Louisiana Indemnity Company, 97-1344, p. 8 (La. 3/4/98), 707 So.2d 1240, 1244.

The accident reports were offered by the plaintiffs to establish that the DOTD had constructive notice of the allegedly defective roadway. But there is other evidence in the record by which this element can be

established, particularly, the testimony of Larry Straub and Jason Campbell.

At trial, Mr. Straub testified that he had lived less than a mile from the site of the accident from about 1971-72 to around 2002. He testified that over the years he had seen "several accidents in that corner and several people that my grandfather ... would have ... come ... wanting to get pulled out of that ditch." For some of the accidents, Mr. Straub testified that "I've seen State Police back there on several different accidents." Mr. Straub also related that despite his familiarity with the area, he had an accident "in that curve" in 1995, and that his wife had wrecked his Trans Am in the same location in 1979.

In February 1995, exactly a year to the month before Mr. Goza's accident, Mr. Campbell testified that he was involved in an accident that was similar to that of Mr. Goza's. Mr. Campbell testified that he was 17 years old at the time and that he was traveling on the unfamiliar road as a result of having missed the turn to his girlfriend's house while driving her home on the night of the accident. He stated that "[t]he cane field had been cut and it was a very deceptive view; it looked like the road kept going. When I got into the curve and noticed that it was a curve I made a hard left turn, at which point the rear of my truck lost control and went into the ditch causing my truck to flip over." The State Police investigated Mr. Campbell's accident.

Thus, the testimony of Mr. Straub and Mr. Campbell not only established a history of car accidents at the same location as Mr. Goza's accident, but Mr. Straub's testimony in particular established

that the problem presented by the curve had been in existence for a significant period of time. Therefore, as the foregoing evidence would be sufficient to support a finding of constructive notice, we find that the trial court's erroneous ruling admitting the accident reports was, at most, harmless error. See also La. C.E. art. 103 A; Wright v. Bennett, 04-1944, p. 6 (La. App. 1st Cir. 9/28/05), 924 So.2d 178, 183.

The DOTD also made the following complaint about the evidentiary rulings of the trial court in its first assignment of error:

> Where, in a road hazard claim against the Louisiana Department of Transportation and Development, the plaintiff is allowed to introduce motor vehicle accident reports spanning a nine year period [1990-1998] five years for which there were no reports, including four year consecutively, [1991-1994] it was legal error for the court to prohibit the defendant from eliciting testimony regarding the four year accident-hiatus, and additionally, legal error to instruct the jury to disregard testimony from the Defendant's expert regarding that same four year period ...
>
> In like manner the court erred in not allowing defendant to make arguments to the jury to the effect that the lack of reported accidents during that period was probative of the highway's safety....

At trial, the DOTD objected to the trial court's exclusion of the evidence referred to in its first assignment of error, but it did not seek to proffer the

evidence that it alleges was improperly excluded. It is well settled that error may not be predicated upon a ruling that excludes evidence unless a substantial right of a party is affected and the substance of the evidence was made known to the court by counsel. La. C.E. art. 103 A(2). In those instances, it is incumbent upon the party who contends his evidence was improperly excluded to make a proffer, and if he fails to do so, he cannot contend such exclusion was erroneous. Hurts v. Woodis, 95-2166, p. 12 (La. App. 1st Cir. 6/28/96), 676 So.2d 1166, 1175. The DOTD neglected to proffer the evidence it contends was erroneously excluded. Based on its failure to proffer the evidence, we decline to review this assignment of error.

In its second assignment of error, the DOTD asserts that it was error to apportion it with any fault. As previously stated, the trial jury allocated the DOTD with 25 percent fault in this matter. In assessing the nature of the conduct of the parties, various factors may influence the degree of fault, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. Clement v. Frey, 95-1119, p. 8 (La. 1/16/96), 666 So.2d 607, 611. In the present matter, the primary conduct of the parties to be compared is the alleged intoxication of Mr. Goza and the alleged defectiveness of the roadway at issue.

INTOXICATION

The first contention of the DOTD under its second assignment of error is that it should not have been assigned any fault because it alleges that the accident was caused solely as a result of Mr. Goza's intoxication. In Petre v. State, Department of Transportation and Development, 01-0876, p. 12 (La. 4/3/02), 817 So.2d 1107, 1114, the Louisiana Supreme Court quoted with approval the following reasoning of the appellate court:

> While no one would take issue with the fact that [the plaintiff's] unacceptable and illegal actions in driving while intoxicated should be weighed heavily against her in considering the extent of DOTD's duty to her, intoxication alone is not enough to automatically prevent her from recovering for DOTD's fault. It is merely a factor to consider in Louisiana's comparative negligence scheme.

Likewise, in the matter before us, the evidence presented to the jury regarding Mr. Goza's alleged state of being intoxicated was merely a factor to be considered by the jury under our comparative fault scheme, as was the alleged road defect. Moreover, the record reveals that the issue of whether Mr. Goza was legally intoxicated was highly disputed in the proceedings below.

Mrs. Goza testified that during all the time she had known Mr. Goza, she had never seen him drink more than one or two beers and that he never drank hard liquor. She further testified that on the date of the accident, she and Mr. Goza went shopping and had

purchased bread, ice and a case of beer that they took with them to a Mardi Gras parade in Addis, Louisiana. While she stated that she did not personally observe Mr. Goza consume any beer that day, she nevertheless assumed that Mr. Goza had consumed two beers on the date of the accident, because when she looked in the vehicle after it was returned to her years later, she found the case of beer that had been purchased still in the vehicle with two cans missing from the case. Other witnesses who saw Mr. Goza at the parade and later at Marley Marina also testified that they did not see Mr. Goza consuming any alcoholic beverages.

Wanzie Everett, a friend of Mr. Goza's who rode on one of the floats in the Mardi Gras parade the Gozas attended on the date of the accident, testified that every year all of the float members for that particular parade would gather at Marley Marina where there would be "food and all that." Mrs. Everett said she danced with Mr. Goza at Marley Marina, and during that time, she did not smell alcohol on his breath nor did he appear to be impaired in any way. She testified that she had never seen Mr. Goza drunk and that on the day of the accident, she "did not see him with any drinks in his hand at all." As Mrs. Everett described, Mr. Goza "seemed perfectly fine," and based on her observation, she would not have had any problem riding in the car with him on the date of the accident.

Anthony Hernandez, a witness who had worked with Mr. Goza prior to the accident, testified that he had seen the Gozas at the Mardi Gras parade on the date of the accident. Mr. Hernandez stated that he was at the parade when the Gozas arrived and upon their arrival, he and his wife crossed the street to greet the Gozas. During the parade, however, Mr. Hernandez

stated that he and his wife viewed the parade from the opposite side of the street from the Gozas and he saw Mr. Goza "off and on," or as he explained "pretty much as each float went by." Mr. Hernandez testified that based on what he observed, Mr. Goza just enjoyed the parade and socialized with those present, as "Jerry was a well-known person. You hardly went anywhere with him that somebody didn't know him." Mr. Hernandez stated that at the parade, he did not smell alcohol on Mr. Goza's breath and he did not observe Mr. Goza drinking any beer or liquor, nor did Mr. Goza appear to be intoxicated. Both Mr. Hernandez and another witness, Linda Smith, testified about their knowledge and experience of Mr. Goza acting as the designated driver at various social occasions.

Part of the evidence offered by the DOTD to establish that Mr. Goza was intoxicated at the time of the accident were his certified medical records from the Baton Rouge General Medical Center, the hospital where Mr. Goza was rushed to on the night of the accident. One of the documents included in Mr. Goza's medical records described his blood-alcohol screening results at 9:30 p.m. on February 11, 1996 as 180. Medical experts at trial translated that number to mean 180 milligrams of alcohol per 100 cubic centimeters of blood or a 0.18 blood-alcohol concentration level; however, annotated to that reported number is a footnote that states, in part, "non-medicolegal method used."

The plaintiffs presented an expert in the fields of toxicology, pathology, and general medicine, Dr. Ernest Lykissa, to testify regarding the validity of the blood-alcohol results reported in Mr. Goza's medical records. Dr. Lykissa stated that he reviewed all of Mr.

Goza's medical records, Mr. Goza's ambulance records, and the depositions of some witnesses, including the deposition of Dr. Bruce Wilkerson, the attending physician that treated Mr. Goza at the Baton Rouge General Medical Center on the night of the accident, to form his opinion. Based on the evidence reviewed, Dr. Lykissa opined that the blood-alcohol results reported in Mr. Goza's medical records were not valid. Primarily, his opinion was based on the footnote "non-medicolegal method used," which he said indicated that the reading was invalid. Dr. Lykissa further stated that the reason the test results would be considered invalid or inaccurate is because no chain of custody was established for the blood sample tested.

On cross examination, Dr. Lykissa admitted that the test results were accurate for the purpose identifying the presence of alcohol relative to the medical treatment rendered, but he disclaimed the accuracy of the test results for any other purposes, especially in light of the annotation "non-medicolegal method used." He stated as a qualitative[3] test, the results were accurate. He explained that the test results would serve a purpose medically of alerting healthcare professionals, particularly anesthetists, to the presence of alcohol in the patient.

Additionally, Dr. Lykissa opined that the nature of Mr. Goza's injury also affected the accuracy of the test results, because science has shown that

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[3] Qualitative is defined as relating to or based on the quality or character of something, often as opposed to its size or quantity. See Webster's Third New International Dictionary 1858 (Philip Babcock Gove, ed., G. & C. Merriam Company 1968)

post-traumatically, alcohol has a tendency to elevate falsely as opposed to prior to the trauma. As he explained:

> Based on Dr. Wilkerson[,] we did [hear] that Mr. Goza's body, during the time that he was trying to save his life, he did by [a] miracle, he was able to tell us that actually he was going through a platonic death; his body was already shutting down. He did say that the muscles were shutting down, the kidneys were shutting down; so the body, what it does marvelously is it makes a decision, it takes priority, it says, wait a minute, I'm bleeding, let me take all the blood out of you guys because I don't need you right now and let me move it over there because that's where I need you. So the body will just drain literally kidney, liver, spleen and take in all the blood into the chest cavity to maintain that blood pressure so necessary to keep the heart pumping. And in doing so[,] it was draining them from all that alcohol, if that was there, and alcohol loves water. And remember, they replaced all his bloodstream with saline. So everything drained out. So we do not have anymore of the, what the so called, you know, compartmentalization of alcohol, where it goes, most of it in the liver, some of it in the kidney, some of it in the brain and so on and so forth. You get it all out in your bloodstream and, therefore, you getting a falsehood. Anything that has been published into making the sciences (inaudible) over and over again that post-traumatic alcohol measurements in the blood are always falsely elevated. And I'm going back on the science that it is.

The DOTD presented the testimony of Dr. Ronald Padgett, accepted by the court as an expert in the areas of medicine and pathology, to dispute Dr. Lykissa's opinion. On cross examination, Dr. Padgett also acknowledged that the lab test of Mr. Goza's blood was done for medical reasons and not for the purposes of a court appearance, but he nevertheless testified that based on his review of Mr. Goza's medical records, there was no reason to discredit the accuracy of the blood-alcohol concentration reported.

It is well settled in Louisiana that the trier of fact is not bound by the testimony of an expert, but such testimony is to be weighed the same as any other evidence. The trier of fact may accept or reject in whole or in part the opinion expressed by an expert. Harris v. State ex rel. Department of Transportation and Development, 07-1566, p. 25 (La. App. 1st Cir. 11/10/08), 997 So.2d 849, 866, writ denied, 08-2886 (La. 2/6/09), 999 So.2d 785. The manifest error standard of review requires that even where the reviewing court may believe that its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on appeal where the record merely demonstrates conflicting testimony as to the facts at issue, and the fact finder chooses to believe one version, rather than the other. Salvant v. State, 05-2126, p. 17 (La. 7/6/06), 935 So.2d 646, 658.

The plaintiffs presented fact and expert witness testimony to discredit DOTD's medical and expert testimony regarding Mr. Goza's alleged intoxication and the affect such alleged intoxication would have on Mr. Goza's ability to drive. Thus, while the record

before us establishes that Mr. Goza did consume some alcohol on the date of the accident, the amount of alcohol consumed and his degree of intoxication, if any, is disputed based on the evidence presented. As such, the weight to be given this conflicting evidence was clearly a matter for the jury to decide. Further, the evidence presented establishes that this is not a case where there is *uncontroverted* evidence of a highly intoxicated driver, and so the evidence presented is not such as to require a finding that Mr. Goza is solely at fault. Cf. Forbes v. Cockerham, 08-0762 (La. 1/21/09), 5 So.3d 839.

ROAD DEFECT

The DOTD further contends that the plaintiffs failed to present any evidence to show that Mr. Goza's accident occurred as a result of defects in the roadway. While the DOTD does not contest the jury's determination that the roadway was defective on appeal, it does argue that the plaintiffs failed to present any evidence proving that the defects caused Mr. Goza's accident.

Whether an unreasonably dangerous defect caused the plaintiffs' damages is a finding of fact and an appellate court may not overturn a jury's finding of fact in the absence of manifest error or unless clearly wrong. Shilling v. State ex rel. Department of Transportation and Development, 05-0172, p. 7 (La. App. 1st Cir. 12/22/05), 928 So.2d 95, 100, writ denied, 06-0151 (La. 4/24/06), 926 So.2d 541. Generally, when more than one cause combines to bring about a plaintiff's harm, the substantial factor test is used to determine whether a particular defendant's conduct is a factor in bringing about plaintiff's harm. Scott v.

Pyles, 99-1775, p. 9 (La. App. 1st Cir. 10/25/00), 770 So.2d 492, 499, writ denied, 00-3222 (La. 1/26/01), 782 So.2d 633.

As a result of the severity of the injuries sustained by Mr. Goza in the accident, he had no memory of the accident or how it occurred. The accident was a single-car accident with no witnesses. At trial, the plaintiffs presented the testimony of John Bates, accepted by the trial court as an expert in civil engineering specializing in traffic accident reconstruction and the evaluation of highway design and maintenance, to establish that the roadway in question contained several defects that caused it to be unreasonably dangerous. The primary defect observed by Mr. Bates was the compound[4] curvature of Louisiana Highway 989-1 at the point where it connects with Louisiana Highway 989-2, making the curve in the road quite sharp.

Mr. Bates testified that the danger presented by the curve under the blanket of night, when Mr. Goza's accident occurred, was increased by the lack of lighting, inadequate signage alerting motorists of the significant curve, an excessive speed limit, and failure to install protective barriers to keep the unwary motorist on the roadway. Mr. Bates formed his opinion based on his personal observation of the accident location, listening to and reading the testimony of various witnesses, and reviewing the seven accident

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[4] Mr. Bates described a compound curve as a curve that has an ever-increasing degree of curvature, meaning that it gets tighter and tighter as one goes around the curve.

reports offered into evidence,[5] including Mr. Goza's accident report. Based on the evidence considered, Mr. Bates opined that the sharpness of the curve was "exactly what created problems out there for ... we know seven accident reports." Mr. Bates explained:

> A driver entering the curve is going to get a sense about how much he needs to turn the wheel, perhaps adjusting his speed a bit, and it should be that same one all the way around, the same degree of turning your wheel. But in this case, where you have that ever-increasing sharpness of the curve a driver will enter as Mr. Goza did here and feel like he has it mastered, but then as he gets a little bit into the curve, the curve has gotten too sharp for him and now he's going to head into that ditch. If there had been warning of, hey, here's what it's like; ... if he'd

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[5] Although, as previously discussed, accident reports are considered hearsay and therefore incompetent, inadmissible evidence, Mr. Bates' testimony based on this evidence is nevertheless admissible. Article 703 of the Louisiana Code of Evidence provides "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be ... of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." Comment (d) following the text of the article further provides "[u]nder this Article the facts or data underlying the expert witness' opinion may properly be: ... facts or data not admissible in evidence (because, for example, their source is inadmissible hearsay), if they are of a kind reasonably relied upon by experts in the particular field in arriving at their opinions or inferences." It has been held that accident reports are the kind of data reasonably relied upon by experts in the field of accident reconstruction. See Turner v. Lyons, 03-0186, pp. 4-6 (La. App. 4th Cir. 1/28/04), 867 So.2d 13, 17-18, writ denied, 04-0741 (La. 5/14/04), 872 So.2d 530.

> been warned then he could do something about it.

He also stated, "[t]hat's what causes the injury. One has lost the control on the highway due to the sharpness of the curve, but the injury is the result of going down into that deep ditch in essence having a head-on collision with the bottom of the ditch and then rolling over."

Mr. Bates stated that the risks presented by the defects in the roadway were amplified by Mr. Goza's lack of familiarity with the road, which he determined based on the following reasons:

> The testimony as I understand it was that two years prior to this accident [Mr. Goza] had been through the curve once, one time going away, one time coming back, that's twice in daylight. Then on the night of the accident he had gone through in daylight; that would be the third time and had come back in daylight, the fourth time. And then at the time of the accident he went through at nighttime. So he had four times in two years that he had been through there. One trip you might say, one round trip two years ago, one round trip at the time of the accident, and the termination of it was the accident that occurred.

Thus, Mr. Bates opined that "the intoxication is not the culprit, it is the design of this roadway being so short of the curve...."

We find this evidence was sufficient to support the jury's finding that the noted defects in the roadway

contributed to the accident as Mr. Bates' testimony related those defects to the circumstances of Mr. Goza's accident. We therefore reject the DOTD's assertion that there was no proof of causation. See also Vallien v. State, Department of Transportation and Development, 01-0566, p. 6 (La. App. 3d Cir. 3/27/02), 812 So.2d 894, 899, writs denied, 02-1184, 02-1198 (La. 6/14/02), 818 So.2d 785 and 786; Scott, 99-1775 at 9-10, 770 So.2d at 499-500; Farbe v. Casualty Reciprocal Exchange, 99-341, pp. 7-8 (La. App. 3d Cir. 10/27/99), 746 So.2d 228, 232-33, rev'd in part on other grounds, 00-0076 (La. 7/6/00), 765 So.2d 994.

FAULT COMPARISON

Therefore, having considered the evidence presented regarding the negligent conduct of each party, we can now consider whether the jury erred in its allocation of fault among the parties. In comparing the evidence of Mr. Goza's conduct of having consumed alcohol and operating a vehicle on the date of the accident (although the amount of alcohol consumed and whether Mr. Goza was legally intoxicated is disputed) and the conduct of the DOTD in failing to decrease the speed limit and in failing to provide adequate lighting, signage, and protective barriers for the safety of unwary motorists on a roadway with such a sharp and dangerous curve, we cannot say that the trial jury erred in allocating the DOTD with some fault. The jury clearly weighed the evidence of Mr. Goza's admitted alcohol consumption and disputed intoxication against the DOTD's awareness of the defectiveness of the roadway resulting in accidents similar to that of Mr. Goza's to find that the DOTD bore some liability in this matter. Moreover, as evidence of Mr. Goza's alleged intoxication was highly

disputed, coupled with evidence that the defective roadway contributed to Mr. Goza's accident, we find the evidence is not so overwhelming as to mandate a finding that Mr. Goza's negligent conduct of consuming alcohol and operating a vehicle be considered the sole cause of the accident at issue. Cf. Forbes, 08-0762, 5 So.3d 839. Therefore, we reject the DOTD's assertion that the trial jury erred in allocating it with any fault.

In its final assignment of error, the DOTD contests the trial court's ruling on JNOV to reduce rather than vacate the jury's award of future medical expenses. We find no merit in this assignment of error.

Louisiana Code of Civil Procedure article 1811(F) provides that a motion for judgment notwithstanding the verdict may be granted on the issue of liability or on the issue of damages or on both. In this case, the JNOV was granted on the issue of future medical damages. Typically, the standard of review of a JNOV on appeal is a two-prong inquiry. First, we must determine whether the jury verdict is supported by competent evidence and is not wholly unreasonable. To make this determination, we must, after considering all of the evidence in the light most favorable to the party opposing the motion, find that it points so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict on the issue. Second, after determining that the trial court correctly applied its standard of review as to the jury verdict, the appellate court reviews the JNOV using the manifest error standard of review. Adams v. Parish of East Baton Rouge, 00-0424, p. 7 (La. App. 1st Cir. 11/14/01), 804 So.2d 679, 687, writ denied, 02-0448 (La. 4/19/02), 813 So.2d 1090.

In this case, the DOTD, in whose favor the JNOV was granted, does not contest the granting of the JNOV, but rather seeks a determination of whether the award rendered pursuant to the JNOV is manifestly erroneous. Therefore, we will limit our review of this assignment of error to the second prong of the inquiry under the standard of review.[6]

An award of future medical expenses is justified if there is medical testimony that they are indicated and setting out their probable cost. Hanks v. Seale, 04-1485, p. 16 (La. 6/17/05), 904 So.2d 662, 672. Nevertheless, when the record establishes that future medical expenses will be necessary and inevitable, courts should not reject the award because the record does not provide the exact value, if the court can determine from the record, past medical expenses, and other evidence a minimum amount that reasonable minds could not disagree would be required. Levy v. Bayou Indus. Maintenance Services, Inc, 03-0037, p. 9 (La. App. 1st Cir. 9/26/03), 855 So.2d 968, 975, writs denied, 03-3161, 03-3200 (La. 2/6/04), 865 So.2d 724 and 727. In such a case, the court should award all future medical expenses that the medical evidence establishes that the plaintiff, more probable than not, will be required to incur. Hymel v. HMO of Louisiana, Inc., 06-0042, pp. 26-27 (La. App. 1st Cir.11/15/06), 951 So.2d 187, 206, writ denied, 06-2938 (La. 2/16/07), 949

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[6] We should point out that the DOTD is appealing the *award* of future medical expenses, which is subject to the manifest error standard of review, rather than the *amount* of future medical expenses, which would be subject to the abuse of discretion standard of review. Hymel v. HMO of Louisiana, Inc , 06-0042, p. 27 (La. App 1st Cir. 11/15/06), 951 So.2d 187, 206, writ denied, 06-2938 (La. 2/16/07), 949 So 2d 425.

So.2d 425. Although future medical expenses must be established with some degree of certainty, they do not have to be established with absolute certainty, as an award for future medical expenses is by nature somewhat speculative. Grayson v. R.B. Ammon and Associates, Inc., 99-2597, p. 35 (La. App. 1st Cir. 11/3/00), 778 So.2d 1, 23, writs denied, 00-3270, 00-3311 (La. 1/26/01), 782 So.2d 1026, 1027.

In the matter before us, Mr. Goza presented the testimony of three of his treating doctors by video depositions that were played to the jury. Of the testimony presented, only the testimony of Dr. Gray W. Barrow is pertinent to the issue of the award of future medical expenses.[7] Dr. Barrow, a physiatrist or doctor of physical medicine, had been treating Mr. Goza for chronic pain symptoms in his chest, neck, low back and knees for approximately nine years at the time his deposition was taken in 2006. He testified that in the beginning, Mr. Goza's treatment included physical therapy and epidural steroid injections, in addition to strong narcotic pain medications; however, at the time of Dr. Barrow's deposition, the primary treatment regime being used was narcotic pain medications. Dr. Barrow disclosed that Mr. Goza had been on various narcotic pain medications, including Methadone, Vicodin, Lortab, Percocet, MS Contin, and

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[7] The other doctors were Dr. Bruce L. Wilkerson and Dr. Paul M. Dammers. Dr. Wilkerson, a cardiothoracic surgeon, primarily treated Mr. Goza in the initial 40-day period right after the accident when he was hospitalized in the Baton Rouge General Medical Center. Dr. Dammers, a clinical, medical, and neuropsychologist, saw Mr. Goza on isolated occasions in 1996, 2000, and 2004 to evaluate him relative to his brain injury and memory problems.

was presently using Oxycontin. As a result of Mr. Goza's continuous need for narcotic pain medications, Dr. Barrow testified that Mr. Goza was seen "at least every three months just to manage his medications and make sure that things are going okay with him." As Dr. Barrow explained,

> [W]e treat pain now like we would treat a disease because it's been shown that if you don't adequately treat pain it can affect almost every system in your body and shorten your life span. He certainly has chronic pain. So [Oxycontin is] a strong pain medication, but it's also I think appropriate in his case and has given him an improved quality of life and allowed him to function better.

As for Mr. Goza's long-term prognosis, Dr. Barrow stated that other than just continuing to be seen by a doctor of physical medicine, "if his condition worsens, the only thing I think he may need would possibly be a total knee replacement in the future, but I don't think there's any surgical remedy for his other problems, just medical management, which I've been doing."

Based on Dr. Barrow's testimony, we conclude that the trial court was not clearly wrong in finding that Mr. Goza was entitled to an award of future medical expenses, as Dr. Barrow's testimony clearly indicates that future medical treatment will be required. Although Mr. Goza failed to present any evidence as to the specific cost of such future treatment, as previously stated, it is proper for the trial court to determine future medical expenses on the basis of the record, past medical expenses, and other evidence. Levy,

03-0037 at 9, 855 So.2d at 975. The parties stipulated that Mr. Goza's past medical expenses were $326,001.81. Therefore, we find no error in the trial court's JNOV award of future medical expenses in the amount of $150,000.00.

CONCLUSION

For the foregoing reasons, we affirm the jury's verdict, as amended by the JNOV granted by the trial court. All costs of this appeal in the amount of $5,905.00 are assessed to the State of Louisiana, through the Department of Transportation and Development.

AFFIRMED.

WELCH, J., CONCURRING IN PART, DISSENTING IN PART.

I concur with the majority opinion with respect to the evidentiary rulings and the allocation of fault to DOTD; however, I dissent from that portion of the opinion upholding the trial court's $150,000.00 award for future medical expenses because I find there is no reasonable basis in the record to support that award.

Future medical expenses must be established with some degree of certainty. **Grayson v. R.B. Ammon and Associates, Inc.**, 99-2597, p. 35 (La. App. 1st Cir. 11/3/00), 778 So.2d 1, 23, writs denied, 2000-3270, 2000-3311 (La. 1/26/01), 782 So.2d 1026, 1027. An award for future medical expenses must be supported by medical testimony as to the need for such expenses and their probable cost. **Spangler v. Wal-Mart Stores, Inc.**, 1995-2044, p. 7 (La. App. 1st Cir. 5/10/96), 673 So.2d 676, 681. It is true that courts have upheld future medical expense awards in the absence of a precise dollar figure where there was other evidence in the record to support the award. See e.g. **Doucet v. Doug Ashy Bldg. Materials, Inc.**, 95-1159 (La. App. 3d Cir. 4/3/96), 671 So.2d 1148 (upholding a future medical award where there was evidence of the cost of past medical treatment in the record). However, such evidence is clearly lacking in this case.

Although the evidence showed that as a result of his pain, Mr. Goza would likely continue to require pain medications and would need to consult with Dr. Barrow four times a year for management of his medications, there is no evidence in the record as to the probable cost of that treatment. Dr. Barrow did not

testify as to the probable cost of Mr. Goza's future pain management treatment, nor did he provide any testimony as to the cost of Mr. Goza's past pain management treatment. Moreover, the $326,000.81 past medical expense award does not provide a reasonable basis on which to calculate an amount for future pain management treatment because those expenses were stipulated to by the parties without regard to the particular medical treatment Mr. Goza received. Any monetary award for future medical expenses under the circumstances of this case would require sheer speculation by the fact finder. Because Mr. Goza failed to offer evidence to establish future medical expenses with any degree of certainty, I believe the trial court erred in awarding $150,000.00 in future medical expenses, and for that reason, I would reverse the award for future medical expenses.

Opinion Granting Rehearing for Limited Purpose

GUIDRY, J., on rehearing.

In our original opinion, we stated the DOTD had waived any objections raised in its first assignment of error relative to the trial court's exclusion of evidence based on the DOTD's failure to proffer the evidence that it asserts was erroneously excluded by the trial court. Accordingly, we refused to consider the correctness of those rulings in reviewing the judgment appealed. To the extent that DOTD's first assignment of error addressed excluded evidence that it failed to proffer, such as the testimony of its records custodian, we maintain our ruling. However, in its rehearing application, DOTD urges that in its first assignment it further contested the trial court's admonishment to the jury to disregard certain arguments and testimony that *were presented*. This rehearing is granted for the limited purpose of addressing this specific argument.

DOTD argues that the trial court erred in disallowing any questions regarding the years-long gaps between the dates of the accident reports offered by the plaintiffs as being suggestive of safety and in instructing the jury to disregard the following testimony from its expert witness, David Hall:

> So we had three accidents that occurred in 1990, and then we had a gap of five years, which tells me that something must've been done out there in 1990 because we stopped having accidents before the '95 accident occurred, which-

Plaintiffs' counsel immediately objected to the testimony, and initially in response to the objection, counsel for the DOTD stated, "I'm not going to ask him anymore about it. **He hasn't proved any of this.**" (Emphasis added.) The DOTD further pointed out that on cross-examination of the plaintiffs' expert witness, John Bates, the DOTD was allowed to elicit testimony regarding the *dates* of the accident reports that were erroneously admitted by the trial court, but was prohibited from questioning the witness further about whether an inference could be drawn from the plaintiffs' failure to present accident reports for the years between the dates of those reports that were presented at trial. However, due to the lack of foundational evidence in the record, by proffer or otherwise, to support the testimony that the jury was ordered to disregard or the line of questioning the DOTD attempted to present, the trial court's exclusion of the evidence was proper.

The factual basis for an expert opinion determines the credibility of the testimony. An unsupported opinion can offer no assistance to the fact finder, and should not be admitted as expert testimony. Miramon v. Bradley, 96-1872, p. 6 (La. App. 1st Cir. 9/23/97), 701 So.2d 475, 478. The trial court's inquiry must be tied to the specific facts of the particular case. The abuse of discretion standard applies to the trial court's ultimate conclusion as to whether to exclude expert witness testimony and to the trial court's decisions as to how to determine reliability. Ashy v. Trotter, 04-612, pp. 18-19 (La. App. 3d Cir. 11/10/04), 888 So.2d 344, 356, writs denied, 05-0180, 05-0347 (La. 3/24/05), 896 So.2d 1045, 1047. To ensure reliability, the *Daubert* standard requires that the expert's opinions be grounded in methods and procedures of science,

rather than just subjective belief or unsupported speculation. Devall v. Baton Rouge Fire Department, 07-0156, pp. 3-4 (La. App. 1st Cir. 11/2/07), 979 So.2d 500, 502. The reliability of a non-scientist expert's testimony, when it is not formulated on scientific research, is still judged using the *Daubert* standard. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238 (1999).

The specific testimony that the jury was ordered to disregard and potential similar testimony the jury was kept from hearing based on the line of questioning the DOTD was prohibited from asking, while being elicited from expert witnesses, was nonetheless speculative, especially in light of the fact that no evidence was offered definitively proving that no accidents occurred during the intervening time periods of the accident reports that were offered by the plaintiffs; whereas there was actual evidence presented by the plaintiffs (as discussed in our original opinion) that other accidents occurred at the same location that were not represented in the accident reports offered by the plaintiffs. So to the extent that the records shows that the testimony the DOTD tried to present to the jury was unsupported, speculative, and contrary to the testimony of other witnesses based on actual, personal knowledge, the trial court did not err in ordering the jury to disregard the testimony of Mr. Hall or in prohibiting the DOTD from eliciting speculative testimony from the expert witnesses presented at trial.

Therefore, having concluded the trial court's exclusion of the referenced testimony was correct, we adhere to the result reached in our original opinion.

REHEARING GRANTED WITHOUT ORAL ARGUMENT FOR THE LIMITED PURPOSE OF CLARIFYING THIS COURT'S ORIGINAL OPINION.

WELCH, J., concurs without reasons.

APPENDIX B

18TH JUDICIAL DISTRICT COURT
PARISH OF WEST BATON ROUGE
STATE OF LOUISIANA

No. CV-28196-D

[Filed September 4, 2007]

JERRY GOZA)
)
VS.)
)
WEST BATON ROUGE PARISH)
)

NOTICE OF RENDITION OF JUDGMENT

TO: MICHAEL PALMINTIER, ATTY
WALTER L. SMITH, ATTY
JOHN AYRES, III, ATTY
WESLEY DANIEL, ATTY

THIS IS TO ADVISE YOU THAT THE HONORABLE WILLIAM DUPONT, JUDGE OF OUR SAID COURT, SIGNED ON 9-4-07, AND FILED ON 9-4-07, A JUDGMENT IN THE ABOVE MATTER ON:

JUDGMENT ON JNOV

TRIED ON 7-23-07, A CERTIFIED COPY OF SAID JUDGMENT BEING ATTACHED HERETO.

I HEREBY CERTIFY THAT NOTICE OF RENDITION OF JUDGMENT WAS MAILED TO COUNSEL OF RECORD IN THE ABOVE MATTER, LISTED HEREIN, ON 09/13/2007.

MARK J. GRAFFEO, CLERK OF COURT

BY: /s/ _____
DEPUTY CLERK OF COURT

NUMBER: 28,196 DIVISION "D"
18TH JUDICIAL DISTRICT COURT

PARISH OF WEST BATON ROUGE

STATE OF LOUISIANA

JERRY L. GOZA AND GLADYS GOZA	)
	)
VERSUS	)
	)
PARISH OF WEST BATON ROUGE,	)
STATE OF LOUISIANA AND	)
ABC INSURANCE COMPANY	)
	)

JUDGMENT ON MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL OR REMITTITUR

The Motion for Judgment Not Withstanding the Verdict, or in the Alternative, Motion for New Trial or Remittitur filed on behalf of defendant, State of Louisiana, came before this Court in a hearing on July 23, 2007.

Present were:

Michael C. Palmintier, counsel of record for plaintiffs, Jerry Goza, et al; and

John Ayres and Joni McKenzie, counsel of record for defendant, State of Louisiana.

After hearing oral arguments, examining all pleadings and reviewing the pertinent statutory and jurisprudential law, the Court orally assigned reasons during the hearing, and ruled as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion for Judgment Not Withstanding the Verdict, or in the Alternative, Motion for New Trial or Remittitur filed by defendant, State of Louisiana, is granted in part and denied in part, the court exercising its prerogative to amend the entire judgment as set forth hereinbelow.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Judgement is hereby amended as follows:

Jerry Goza	Physical pain, suffering, mental anguish and emotional distress, past, present and future . . .	$ 600,000.00
	Loss of enjoyment of life and permanent disability	$ 100,000.00
	Future medical expenses	$ 150,000.00
	Past medical expenses	$326,001.81
	Lost wages, past and future, including non- market services	

	and employer paid benefits	$ 678,195.00
Gladys Goza	Loss of Consortium ...	$ 100,000.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the amounts listed are subject to the allocations of comparative fault which was 25% to DOTD and 75% to plaintiffs.

JUDGMENT RENDERED on the 23rd day of July, 2007.

JUDGMENT READ AND SIGNED on this 4 day of September 2007 in Plaquemine, Louisiana.

/s/William Dupont
HONORABLE WILLIAM DUPONT
JUDGE, 18TH JUDICIAL DISTRICT COURT

Submitted by:

deGravelles, Palmintier, Holthaus & Fruge', L.L.P.
618 Main Street
Baton Rouge, Louisiana 70801-1910
Telephone: (225) 344-3735
Facsimile: (225) 344-0522

By: /s/Michael C. Palmintier
Michael C. Palmintier
Bar Roll Number: 10288

CERTIFICATE

I do hereby certify that on the 27th day of August, 2007, I have circulated a copy of the above and foregoing judgment via facsimile to:

John H. Ayres, III
Joni McKenzie
Assistant Attorney General
P.O. Box 94005
Baton Rouge, LA 70804-9005

Via Facsimile
326-6486

and after three full working days, no opposition was received by any party.

Baton Rouge, Louisiana, this 31st day of August, 2007.

/s/Michael C. Palmintier
Michael C. Palmintier

APPENDIX C

18TH JUDICIAL DISTRICT COURT
PARISH OF WEST BATON ROUGE
STATE OF LOUISIANA

No. CV-28196-D

[Filed April 18, 2007]

JERRY GOZA	)
	)
VS.	)
	)
WEST BATON ROUGE PARISH	)
	)

NOTICE OF RENDITION OF JUDGMENT

TO: MR. MICHAEL C. PALMINTIER, ATTORNEY
MR. JOHN AYRES, ATTORNEY
MR. WESLEY C. DANIEL, ATTORNEY
MR. WALTER LANDRY SMITH, ATTORNEY

THIS IS TO ADVISE YOU THAT THE HONORABLE WILLIAM C DUPONT, JUDGE OF OUR SAID COURT, SIGNED ON APRIL 10, 2007, AND FILED ON APRIL 18, 2007, A JUDGMENT IN THE ABOVE MATTER ON:

TRIAL BY JURY

TRIED ON OCTOBER 17 - 20, 2006, A CERTIFIED COPY OF SAID JUDGMENT BEING

ATTACHED HERETO.

WE HAVE NOT RECORDED THIS JUDGMENT IN THE MORTGAGE RECORDS
PLEASE ADVISE CLERK IF THIS JUDGMENT NEEDS TO BE RECORDED*

I HEREBY CERTIFY THAT NOTICE OF RENDITION OF JUDGMENT WAS MAILED TO COUNSEL OF RECORD IN THE ABOVE MATTER, LISTED HEREIN, ON 04/19/2007.

MARK J. GRAFFEO, CLERK OF COURT

BY: /s/ _____
Deputy Clerk of Court

NUMBER: 28,196DIVISION "D"
18TH JUDICIAL DISTRICT COURT

PARISH OF WEST BATON ROUGE

STATE OF LOUISIANA

JERRY L. GOZA AND GLADYS GOZA	)
	)
VERSUS	)
	)
PARISH OF WEST BATON ROUGE,	)
STATE OF LOUISIANA AND	)
ABC INSURANCE COMPANY	)
	)

JUDGMENT

This cause came on for trial by jury on the 17th, 18th, 19th and 20th days of October, 2006. Present in Court were Michael C. Palmintier and Diana B. Moore, counsel for plaintiffs, JERRY L. GOZA AND GLADYS GOZA, and John Ayes and Joni McKenzie, counsel for defendant, STATE OF LOUISIANA. Following the presentation of evidence by the parties, and having been appropriately charged as to the law applicable to this case, the jury retired to deliberate upon and did eventually render a verdict in the case, which verdict the court now adopts as follows:

IT IS ORDERED, ADJUDGED AND DECREED that the defendant, STATE OF LOUISIANA, be apportioned TWENTY-FIVE PERCENT (25%) fault for causing the February 11, 1996 accident, and that JERRY L. GOZA be apportioned SEVENTY-FIVE (75%) fault for causing said accident.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment herein against defendant, STATE OF LOUISIANA, for damages in favor of plaintiffs in the following amounts, subject to any legal adjustments required by the jury's apportionment of fault.

Jerry Goza	Physical pain, suffering, mental anguish and emotional distress, past, present and future	$0.00
	Loss of enjoyment of life and permanent disability	$100,000.00
	Future medical expenses	$500,000.00
	Past medical expenses	$326,001.81
	Lost wages, past and future, including non- market services and employer paid benefits	$678,195.00
Gladys Goza	Loss of Consortium ...	$100,000.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, STATE OF LOUISIANA, pay legal interest on the above-listed amount from February 11, 1997 (the date of filing of the original Petition for Damages) until paid and all costs of these

proceedings, including expert witness fees as more fully set forth hereinbelow;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the expert witness fees of the experts hereinafter named be and are hereby fixed as costs of court, as follows:

John Bates	$17,000.00
Dr. Ernest Lykissa	$ 5,000.00
Dr. Pat Culbertson	$ 1,012.00

JUDGMENT RENDERED on the 20th day of October, 2006.

JUDGMENT READ AND SIGNED on the 10 day of April, 2007, at Plaquemine, Louisiana.

/s/William Dupont _____
THE HONORABLE WILLIAM DUPONT
JUDGE, 18TH JUDICIAL DISTRICT COURT

APPENDIX D

THE SUPREME COURT OF THE STATE OF LOUISIANA

NO. 2009-C-2146

[Dated December 11, 2009]

JERRY L. GOZA AND GLADYS GOZA	)
	)
VS.	)
	)
PARISH OF WEST BATON ROUGE, STATE OF LOUISIANA AND ABC INSURANCE COMPANY	)

IN RE: Louisiana State of et al.; Transportation and Development Dept. of; – Defendant(s); Applying For Writ of Certiorari and/or Review, Parish of W. Baton Rouge, 18th Judicial District Court Div. D, No. 28,196; to the Court of Appeal, First Circuit, No. 2008CA 0086;

December 11, 2009

Denied.

JLW
CDK
BJJ
JTK
GGG

VICTORY, J., would grant.
CLARK, J., would grant.

Supreme Court of Louisiana
December 11, 2009

/s/ Carmen B. Young
Deputy Clerk of Court
For the Court

APPENDIX E

18TH JUDICIAL DISTRICT COURT
PARISH OF WEST BATON ROUGE
STATE OF LOUISIANA

No. 28,196
DIV. "D"

[Dated October 16, 2006]

JERRY GOZA AND	)
GLADYS P. GOZA	)
	)
VERSUS	)
	)
PARISH OF WEST BATON	)
ROUGE and STATE OF	)
LOUISIANA, DOTD	)
	)

TRANSCRIPT OF THE ABOVE-ENTITLED PROCEEDING CAME ON FOR HEARING IN OPEN COURT AT THE PARISH COURTHOUSE LOCATED IN PORT ALLEN, LOUISIANA, ON THE 16TH DAY OF OCTOBER, 2006.

THE HONORABLE WILLIAM C. DUPONT, JUDGE, PRESIDING.

****

APPEARANCES:

MICHAEL PALMINTIER
ATTORNEY AT LAW
618 MAIN STREET
BATON ROUGE, LA 70801
REPRESENTING THE PLAINTIFFS

JOHN H. AYRES, III
JOANIE MCKENZIE
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POST OFFICE BOX 94005
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REPRESENTING THE STATE OF LOUISIANA

REPORTED AND TRANSCRIBED BY:
JERRI C. SCHNEBELEN
CERTIFIED COURT REPORTER

* * *

[p.102]

state. They were not gathered from any other record. They were gathered, in fact, from the parish.

THE COURT:

And I'm not going to say you sure don't have hearsay issues that I'll have to deal with whenever they get to the point of being introduced or not introduced, obviously, you have one accident report from some gentleman right here who's going to testify. So that's here or there on that.

But I just want to address the 409 issue right now because it, either it is or it isn't and I have serious problems with accident reports. I don't have problems with these studies they go out there and the report they made and all that, you can't have them; you can never get them, okay. But accident reports have been out there long before 409 and if they abolish 409 tomorrow they'll still be doing accident reports. They weren't created for 409.

Put on what you need to make your record. I'm not - I mean, obviously this may go up and we'll get an answer to that.

MR. PALMINTIER:

Judge, just so the Court will be aware, it will go up because it is the, it is the express position of the State of Louisiana that they will appeal everything.

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THE COURT:

I'm sure it's going to go up. Well, I don't know, it didn't go up on the last one so you can't make that as an emphatic statement, okay.

MR. PALMINTIER:

Well, it didn't get to the jury.

THE COURT:

It doesn't matter, you can't make that as an emphatic statement that it will go up.

MR. AYRES:

I'd like to call Mr. Hadi Shirazi to the stand, Your Honor.

Your Honor, Ms. McKenzie will conduct his direct.

THE COURT:

Okay.

MS. MCKENZIE:

Just for the record, Your Honor, Joanie McKenzie on behalf of the state. Your Honor, is it all right if I sit?

THE COURT:

Sure, absolutely.

WHEREUPON, THE WITNESS, MR. HADI SHIRAZI, AFTER HAVING BEEN FIRST DULY SWORN WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. MCKENZIE:

Q. Ms. Shirazi, would you please state your name and business address for the record?

A My name is Hadi Shirazi. My business

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address is 1201 Capital Access Road, Baton Rouge, Louisiana, 70802.

Q And where are you employed?

A I'm employed with Louisiana Department of Transportation and Development.

Q And what is your position there?

A I'm a traffic safety engineer with hazard elimination funds coordinator, highway safety improvement program, State of Louisiana, Louisiana Department of Transportation and Development.

Q And how is that program funded or that office funded where you work?

A All of my programs is funded by 152, 23USC 409 and 402.

Q And tell me, if you would, explain to me, you said 152?

A Yes.

Q 409 and 402, if you would explain to me please your understanding of 152?

MR. PALMINTIER:

I don't want this witness providing testimony regarding legal issues, Your Honor.

MS. MCKENZIE:

Your Honor, his office - he is the coordinator for this program, obviously he would have to know what it is in order to be able to coordinate and run the program.

THE COURT:

Let him testify. You already know how I'm - it's highly unlikely I'm gonna change

[p.105]

my ruling, but go ahead and testify.

MR. PALMINTIER:

Nonetheless, Your Honor, I have to make those objections because they appeal everything.

THE COURT:

All right. Overruled. Go.

CONTINUING EXAMINATION BY MS. MCKENZIE:

A My office is basically work with 152 program regarding all the highway safety improvements using a data that is compiled from the crash reports, which is most - part of a crash report is part of a crash report is designed in order to collect the data for providing and getting the 152 programs. And my office was solely responsible for gathering those data from the crash reports.

Q And how does your office gather this data from the crash reports?

A The crash reports - first of all, we designed the form using the 402 and 152 program part of 409.

Q You designed the --

A Designed the complete form.

Q The crash reports form?

A Crash reports form, uniform motor vehicle crash reports system, it helps our Highway Safety Commission, which Colonel Champaign is involved in this scenario. We put all the elements together, see what all those elements needed in order to do a better investigation and better requirement to getting 152 funds on those crash reports.

[p.106]

Q And this is a cooperative effort between DOTD and the Highway Safety Commission?

A Yes.

Q Okay.

MR. PALMINTIER:

Object to leading questions.

THE COURT:

Sustained.

CONTINUING EXAMINATION BY MS. MCKENZIE:

Q And describe how the data is obtained by DOTD?

A Basically we train all the investigation officers; it can be a state police, a city police and sheriff in order to, we learn how to use the uniform crash reports. When they train and learn how to do it, basically, we go ahead and put a class together, you give them a manual in order to use this manual to fill out this crash report correctly and explain to them why this crash report is so important for DOTD in order to getting the fund for 152.

Q And the officers that complete the form, are they - are all the officers in the state required to complete the same form?

A Every investigation officer on crash scene use the same form, that's the reason why we call it uniform motor vehicle crash report.

Q Does that include parishes?

A Every parish, every sheriff office, every city police and every state police has to fill out tile same form. Basically, we sit down every

[p.107]

quarter with this group of people, we call it traffic record forum in order to design this form and basically evolve it as we go, make it better and more efficient for DOTD purpose, for highway safety improvement.

Q And the officers who complete these forms, are they trained to complete them?

A Yes. They're well trained through Highway Safety Commission, part of it through DOTD.

Q And is there a manual?

A There is a manual outside that we put out every other year or sometimes every year; we modify the manual in order to make it easier and more effective to fill out the crash report.

Q And what is the name of that manual?

A It's basically Manual for Crash Reporting System.

Q Okay. Is that the technical name for it?

A There's not technical name for it, basically give a technical name for it but when we put the manual together we call it Highway Safety for Motor – Meaningful Motor Vehicle Crash Reporting System.

Q Okay. Does DOTD participate in the deveiopment of these uniform crash reports?

A We have to participate because not only we paying for it in order to put those elements in those crash reports for our highway safety improvement program but also we want to make sure the elements fill out correctly in order to, for us to go back and do the survey and analyze the data in order to see what other improvements we need to

[p.108]

do. Because, again, crash reports is one of our main foundations of the highway safety improvement program in order to get 152 and 133 funding.

Q And what type of funds pay for the development of the uniform crash reports?

A 402 and 409.

Q The specific element that the officer completes in the uniform crash report, are those criteria, have they been developed over time as a result of safety improvements?

A As I recall, since 1968 we're looking at so many different reports how we can evolve it and how we can modify this report, make it more prudent for us to go back and look at what they see after the crash and what we can use those in order to improve it for future. There is a manual, we call it MMUCC, Minimal Model Uniform Crash Criteria, they give us a recommendation how to put this form and how to analyze the crash report in order to make it more

efficient for 152 and also for other purposes of safety improvement.

Q Are there various editions of this manual?

A The manual evolve as the time goes. Again, when I look back some of the manuals go back way to 1968, so since then we look around and see what else they recommended since then and what we have to go change since now. Because the newest crash report came out last year or the year before, I'm sorry, the year before. That was a newer updated crash report we put out together.

Q And do these manuals provide a portion which

[p.109]

indicates what the uses of these uniform crash reports would be?

A They do.

Q And what would those uses be?

A Basically how to put together what kind of a question needs to be looked at, basically what kind of element the state trooper, sheriff office or city police need to go out there, fill out those elements, write the right, correct description and how to fill this correct description for us in order to go back and do the following investigation.

Q Is engineering purpose one of the - one of your primary reasons for using a uniform crash report?

A Yes, it is.

Q And what is the source of funds that is used for the development of the uniform crash report and the manual used to train officers how to complete it?

A It's part of 152, the other part of 402, which is coming from Highway Safety Commission in conjunction with DOTD.

Q And are both of those safety --

A Safety related for highway safety improvement programs, yes, ma'am.

Q I'm going to show you a series of documents and ask you if you can identify them and explain to the Court their purpose. Give me just a minute, I thought I had them in order.

THE COURT:

[p.110]

This affidavit of Mr. Shirazi is also introduced with the motion?

MS. MCKENZIE:

Yes, sir.

THE COURT:

Okay.

MS. MCKENZIE:

Well, we don't need it. I mean, we have the witness live.

THE COURT:

I just see "judge's copy" I don't know where the original is at.

MS. MCKENZIE:

We have the original, Your Honor.

CONTINUING EXAMINATION BY MS. MCKENZIE:

Q Mr. Shirazi, let me show you – to please identify this document. (Tendering document.)

A (Witness examining document.) That's one of the beginning of a manual for users getting accident report form, which came in 1969.

Q And what, if you know, is the purpose of that document?

A Basically what huh (inaudible) the administration at that time with the other agency get together trying to basically show how the form fill out correctly for the purpose of using the safety funds in order for highway safety improvement program. The process they need to go through in order to get to that point.

Q And this is back in 1969?

A Back '69; that's what the date say.

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Q And if you would Mr. Shirazi, on page 1 of this document, right here it says this is of the accident report, if you would please read for the Court what that says.

A Almost all other police reports are for prosecution or to aid in the apprehension of criminals. An accident report is used as a basis for enforcement, engineering and education. A man who analyses report to determine the need in this field must have the full benefit of the investigation officer's observation. To a large degree opinions and observations govern decisions (inaudible) policies. My apology for the accent, sorry.

Q And I'm going to show you another document. Would you please identify that for the record. (Tendering document.)

A (Witness examining document.) That's another form came up a little bit later, and I think this is a little bit later than 1969.

Q So this is a revision?

A This is basically a revision. Again, every other year or three years when I look at my history or my own file I see these things revised as it goes, and they add some stuff into it and make the other revision to make it better complete and get the point to the officer, how to fill it out and use for Highway Safety Improvement Program.

Q So in other words, this is not a static process, it's something that's evolving?

A No. Every year or every other year you have

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to go back and evolve it because we get more input through this.

Q I have another sheet or another document, Mr. Shirazi. Would you please identify that document. (Tendering document.)

A (Witness examining document.) That's the same form basically, more people involve into it, which is manual for use of the Uniform Accident Report form. At that time they call it accident, not crashes, and that's for January 1981, which came two years or three years after that.

Q And in that document does it list accident reports?

A It should. All of them have the same introduction to begin with, and basically tell officers, any officers how to -- what we're doing it for.

Q And that purposes includes engineering purposes, is that correct?

A Yes. Engineering, education and also enforcement.

Q And would you please identify this document. (Tendering document.)

A (Witness examining document.)

MS. MCKENZI:

Your Honor, if I may, just introduce all of them at the end?

'THE COURT:

That's fine.

A This is basically the one from July 1991 that we put together with the help of Highway

[p.113]

Safety Commission and Federal Highway Administration and other federal entities to basically introduce how to do it. At that time 152 fund came into the picture.

Q At again this is a --

A Manual, yeah, manual for use of the Uniform Accident Report form which is a revision.

Q And these manuals which you have identified, how are they - what funds are used to produce them?

A At that time was 402 funds and part of 152 funds at the same time.

Q And those are safety funds, is that correct?

A Safety funds, right.

Q Mr. Shirazi, if you could, identify this document? (Tendering document.)

A (Witness examining document.) That's basically the revision that we introduce to the state troopers and how to basically do the same thing, which is uniform crash reporting system, accident reporting system, my bad, which became the main one 1993. And basically a state trooper they get heavily involved on this one because of more interest and also engineering and education of the investigating officer. And basically they put their two cents worth into it too.

Q And that document, how was - what funds were used for the production of it?

A 402, 409-152 fund.

Q And I'll hand you another document for identification please. (Tendering document.)

A (Witness examining document.) That's

[p.114]

basically when we modify a lot on the Uniform Crash Report, we call it now Manual for Use of the Uniform Motor Vehicle Traffic Crash Report. We changed the accident to crash because there is a philosophy behind that, however, it was completely done not only to help the Federal Highway Administration but also mainly done with the Louisiana Highway Safety Commission, DOTD and the State Police.

Q And with what funds?

A This one was fully funded to 152 and DOTD processed the entire system.

Q And what year was that?

A 1999.

Q And the other document I handed you for identification?

A That's the one that came out four years ago, which is January 2002 Manual for Use of Uniform Motor Vehicle Traffic Crash Report, same scenario than the previous one but this has also some other details because we changed the form to make it more user-friendly for other investigative officers including sheriff and city police in order to use the same kind of form. Basically, they all changed as a year ago, the requirement changed as a year ago.

Q Now, Mr. Shirazi, I'm handing you a video tape entitled "Safety Starts With Crash Data". Are you familiar with this video tape?

A Yes, I'm very familiar with this one. That's something that Colonel Champagne and I,

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which is my office basically put together to show any investigating officer, could be sheriff, city police or state trooper, to see how important the crash report is for our finding a hazard location, and why the importance of filling those forms correctly so we can go back and using their knowledge, the way they fill out the form get the 152 fund program for Highway Safety Improvement Program.

Q And if you know, what funds were used to produce that video tape?

A Huh, that's 152 and 402, which is 409, 402 we call it.

Q Now I'm going to hand you another document, if you can please identify that for the Court and tell us what it's used for. (Tendering document.)

A (Witness examining document.) This is basically huh, we put a manual together with – this is a GSRI, GSRI stands four Gulf South Research Institute. These are a group of people who came up and tell every DOT how to look at the crash report, how to analyze it, and telling us how the importance of the crash report is for education and engineering and finding the hazard location.

Q And this document as well? (Tendering document.)

A (Witness examining document.) Yeah, this is basically the earlier document that we put together, which is the Highway Safety Program for the State of Louisiana, which compiled with the GSRI reporting system and what we need to get and

[p.116]

how we can interplay the data for use for Highway Safety Improvement Progr n and how we need to identify those locations for 152 funding.

Q My collection.

A If ve got a bunch of them.

MR. PALMINTIER:

Objection. Move to strike. Point to "collection" she said.

THE COURT:

It's a lot of paper.

CONTINUING EXAMINATION BY MS. MCKENZIE:

Q Mr. Shirazi, could you please identify that document, if you can? (Tendering document.)

A (Witness examining document.) That's basically one of our GSRI system, talk about the compatible state and local traffic record system. We had to put, basically come in together to call it traffic record forum which we meet every four months, and GSRI tell us exactly how we can coordinate in getting together with the safety people with the reenforcement, basically, the city, sheriff and state trooper to put this uniform crash report together or basically accident report together and what benefit we need to get out of it, like putting and designing it for 152 fund.

Q If you can identify this document? (Tendering document.)

A (Witness examining document.) That's basically Federal Highway Administration and Governor Highway Administration telling us the importance of designing of the minimum model

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uniform crash report using MMUCC, which is Minimal Model Uniform Crash and what we need to put in the crash report in order to get everything we need to get out of it for highway safety improvement.

Q And what year was that document published?

A This document was published in the year, I can tell you right now, it was the year 2003 when I look at the front page.

Q And is the manual that is provided to officers to guide them as to how to complete the uniform crash reports?

A That's the main manual that's basically telling us and officer what is the best way in order to design and make the crash report for better identification of a hazard location.

Q And is that manual produced with federal safety funds?

A Yes. This manual is designed by federal highway – I mean, Federal Highway Administration Fund, which is various federal funding, one major one is 152-409, and the other one is 402 for education part.

Q I'm handing you now January 2005 is the date of the document. Can you please identify the title of it for the record? (Tendering document.)

A (Witness examining document.) That's a latest one, which is a Manual for Use of Uniform Motor Vehicle

Traffic Crash Report. And this time we end up adding a U.S. Federal Motor Carry Safety Administration, part of this group because they join us that year in order to add portion of the

[p.118]

crash report regarding 18-wheelers and buses and any large vehicles that we need to identify for highway safety improvement.

Q Is that the most recent revision?

A Basically, that's the most recent. We're still working with the newer version as well that has better than this, we're not finished with it yet, we are in progress.

Q But could you identify this document for the Court please? (Tendering document.)

A (Witness examining document.) That's a 1995 Louisiana Traffic Record Data Report. That's basically one of our contractor, which is reason LSU – we're paying – DOTD using 152 funds in order for this person to look at a crash report, identify the problems and the processing the data for data collection.

Q And the next document I'm handing you, could you please identify the title and year of publication of that document. (Tendering document.)

A (Witness examining document.) That's the same thing that the contractor of DOTD put this data for information purpose for Highway Safety Commission and DOTD. And basically anybody who needs to know

what's going on regarding the crash data and how the crash data got collected and how the - what the data coming out of it.

Q And the final document I'm handing you, could you please identify the title and what that document is. (Tendering document.)

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A (Witness examining document.) That's what the Federal Highway Administration put together, the change of transportation. This gives us something regarding how to using the data and what this data going to use for 152 and how - getting those data from us, providing the funding, various federal funding including 152 and 133. And basically these people are using the same data that we provide them for safety improvement.

Q If you would, Mr. Shirazi, tell the Court what was the reason for developing a uniform crash report?

A In order to get the accurate data, collecting the data for the various type of a highway that we need so we can provide the correct analysis in order to get the 152 program running. Without those crash reports that we design and we funding for we not be able to get any 152 fund for Highway Safety Improvement Program.

Q So the state is required to collect this data?

A We have to, yes.

Q In order to receive federal funds, is that correct?

A Yes.

Q Okay. And how does DOTD obtain the data from the accident reports?

A Obtain the data? Basically, we put the – once we get the crash reports we basically look at it, of the accuracy of the location and accuracy of the fill-in the blanks of this crash report, we

[p.120]

send it to our contractor for processing it. When they're processing it they bring it in the program that combined to our program which explains the geometric design and the highway description of the various highway we have and basically divide it to the urban and rural area. And this data basically combined with our traffic count, every geometric that we have and provide a crash history which is basically coming from the crash report. And this crash history is telling us exactly what's going on, what time, when, where and how, and from there we're providing another program in order to find out if this place was two-lane, four-lane, four-lane divide, interstate, and other information that we need to go ahead require 152 program.

Q So after this data is gathered what do you do with it?

A Basically using for the Highway Safety Improvement Program and do the data survey with it.

Q Is the uniform crash report the sole basis for obtaining this data to identify specific places for highway safety improvement?

A It is a foundation of our office as I said earlier. Without that there is no way we can get any 152 whatsoever.

Q And do the DOTD engineers, after all this data is collected and analyzed is it sent to DOTD engineers for any purpose?

A Well, when you said our listing done, our listing connected to the R-9 districts. Every district engineer has access to our data base for

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using for their evaluation on their district and that particular highway they're looking at for any purpose of the highway improvement for the various federal aid program.

Q Is there any portion of DOTD's 152 program that you administer that is not funded by federal safety funds?

A Every 152 program is all federal funds.

Q Okay. And how about the Highway Safety Commission?

A Highway Safety Commission, they got their own 402 funds which is combined with DOTD and Highway Safety Commission, which we use that for – basically we call it soft-side safety for safety improvement

between the public awareness program, public relation for the safety. Using the uniform crash reporting data, some data comes up is not basically for engineering purpose but also for education purpose. We get those data using 402 funds to make people aware of what they need to do and what's going on regarding education.

Q And you mentioned public awareness, I know there's on the radio "Don't be a tailgater", would that be one instance?

A That's one of them. One of them is "Don't be a tailgater," the other one is motorcycle awareness. We've got several going on and they're still going on at the same time. But again, this is a combination of all the federal programs that we have to funding that allows us to do these kind of things.

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Q Could DOTD perform its function under 152 without this data obtained from the crash reports?

A No.

MS. MCKENZIE:

At this time, Your Honor, I would offer, file and introduce the exhibits that Mr. Shirazi has identified.

MR. PALMINTIER:

Object to relevance, Your Honor.

THE COURT:

I'm going to let it in. Overruled.

QUESTIONING BY THE COURT:

Q These funds you get under 402 and 409, when did you start getting those funds?

A Well, it's been a while we getting it. I mean, I started with the Highway Safety Improvement Office since 2000, in the year 2000. And when I was in research program part of it, doing the traffic safety analysis we still had some part of it come from 402.

Q Do you remember when 402 and 409 came into existence?

A No, sir. I cannot tell you exact year without looking at the documentation.

Q Were you there when the uniform reports were created?

A In DOTD?

Q Yeah.

A Talking about 1968, I was born in 1966.

Q Well, I don't know, when were they first – I'm asking do you know when they were first

[p.123]

created, when the uniform reports were first created?

A The way I look at the GSRI was from putting it together since 1968, they were putting the uniform vehicle accident report.

Q Okay, 1968. Was 409 in existence then?

A Huh, I cannot say.

THE COURT:

All right. Go ahead. Anything else?

MS. MCKENZIE:

Just huh, no, I'm going to introduce those exhibits as State Exhibit 1 in globo.

THE COURT:

I let them in. He objected, I overruled him.

CONTINUING EXAMINATION BY MS. MCKENZIE:

Q If I may ask, Mr. Shirazi, was huh, are you aware whether DOTD was receiving federal safety funds in 1996?

A 1996, yes.

Q Thank you.

A Because some of those funds were still being used in some other criteria.

THE COURT:

Counsel, either one of y'all want to enlighten me when 409 came into existence, if you know?

MR. AYRES:

We can look it up and fax you an answer, Your Honor.

MS. MCKENZIE:

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I believe I have it, Your Honor. But, Your Honor, --

MR. AYRES:

Wasn't it signed into law in the Bill Clinton administration? I think it was.

THE COURT:

Okay.

MS. MCKENZIE:

It was passed, Your Honor, because the states were, --

THE COURT:

I understand.

MS. MCKENZIE:

I mean, it was a response to the states' reluctance to gather this data because of their fear of it being used against them in court.

THE COURT:

I understand. I guess the main issue I'm getting to is that it came about long after the state had some form of uniform traffic reports.

MS. MCKENZIE:

And that's correct, Your Honor, but also --

THE COURT:

So they didn't create uniform traffic reports for 409.

MS. MCKENZIE:

Not for 409, Your Honor, but --

THE COURT:

Now, they started using them for that

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after it and massaging them.

MS. MCKENZIE:

But, Your Honor, Mr. Shirazi testified as far back as the 1960s this uniform crash report was being developed for - of course law enforcement purposes but also for traffic engineering purposes so states could use it for highway safety improvement programs.

THE COURT:

No question it was – if they were being developed prior to 409 for that same purpose, nothing in the law would've prevented them from coming into evidence until 409 came in, correct?

MS. MCKENZIE:

You lost me, Your Honor. If you could repeat it?

THE COURT:

409 is what's keeping them from coming into evidence, correct?

MS. MCKENZIE:

Well, yes.

THE COURT:

409 is. If 409 didn't exist we wouldn't be arguing this point.

MS. MCKENZIE:

But it did exist in 1996 when this accident occurred, Your Honor.

THE COURT:

But my question though is that they were being developed, uniform traffic

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reports, prior to 409 by the states for traffic safety issues by themselves.

MS. MCKENZIE:

They were being developed prior to --

THE COURT:

409.

MS. MCKENZIE:

-- the passage of 409.

THE COURT:

For the exact same purposes they're used for today.

MS. MCKENZIE:

No, Your Honor. I mean, --

THE COURT:

Some of them.

MS. MCKENZIE:

-- I mean, because as Mr. Shirazi testified one of those purposes was engineering purposes just to determine --

THE COURT:

Sure, engineering, I can understand that. I understand that, okay.

MS. MCKENZIE:

Yeah. Highway safety improvement programs for roads that needed to be improved.

THE COURT:

Do you have when 409 was?

MR. PALMINTIER:

1987, Your Honor.

THE COURT:

1987, okay.

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MS. MCKENZIE:

And, Your Honor, there is juris prudence in the State of Louisiana that --

MR. AYRES:

Bill Clinton.

THE COURT:

Was that Clinton? I lose track of time periods. There's been too many presidents since I started voting. I don't know who was president when I first started voting.

MS. MCKENZIE:

Your Honor, there is juris prudence in the State of Louisiana that huh, --

THE COURT:

1969, that's when I started voting, I was eighteen. No, '70. All right. Go ahead, I'm sorry.

MS. MCKENZIE:

Your Honor, if I may finish. The most recent pronouncement by the Louisiana State Supreme Court, it's in the James Long case versus State of Louisiana, DOTD, 916 So.2d 87, where the Court held that the inquiries, whether the purpose of the document, not whose possession it's in relates to purposes as defined in 23 USC 130, 144, or 152, which are all safety programs.

THE COURT:

What was the document in that case?

MR. PALMINTIER:

That was a letter, Your Honor.

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MS. MCKENZIE:

Those were letters, Your Honor.

THE COURT:

I just want to know what the document was. I agree with that statement.

MS. MCKENZIE:

The issue was 409.

THE COURT:

I agree with the statement.

MS. MCKENZIE:

I mean the issue is whether or not the purpose of the document is for a) 152 purpose, which clearly it is. You've heard Mr. Shirazi's testimony. He clearly testified that these documents, these class reports are maintained, are produced, collected, compiled, all of that terminology under 409 for a 152 purpose.

Your Honor, under Sevario, which is a Louisiana First Circuit case 752 So.2d 221, traffic count data, accident data, accident reports were all inadmissible under 23 USC 409 Under Pilacio, (spelled phonetically) which is another Louisiana case, accident reports were not admissible or discoverable. Not only that, Your Honor, but plaintiff's experts cannot rely on these privileged documents. And that's in Sevario, which I've cited to the Court, and also in Athomont, (spelled phonetically) which I have a First Circuit Court of Appeal writ grant that addresses that same

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issues, which I would take this time to offer file and introduce.

THE COURT:

Let me see it.

MS. MCKENZIE:

It addresses the testimony of plaintiff's experts. (Tendering document to the Court.)

THE COURT:

Okay. Mr. Palmintier, do you want to address the issue?

MR. PALMINTIER:

Very briefly, Your Honor.

THE COURT:

I hope so.

MR. PALMINTIER:

Section 409. I'll rest, Your Honor.

THE COURT:

No, I want to hear what you've got to say. I don't want you to rest. Make this record because we know it's going up. I think this is one that's going up.

MR. PALMINTIER:

Your Honor, sounds to me like the Louisiana juris prudence can be bent and twisted to say whatever the State wants it to say for purposes of trying to hide the ball on notice or on defect. But what Pilacio relies on and what the other cases rely on are the Supreme Court of the United States holdings, and included in that at the forefront of that is Pierce County,

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which holds exactly as this Court has held in the past.

It is inappropriate for plaintiff to be able to rely on the product the gathering by the state of accident reports, the file that they put their accident reports in, that they did all the work on, that's what this 409 is designed.

THE COURT:

There are no results of that. You don't get the results either after they compile it.

MR. PALMINTIER:

Well, no. What the State would have us believe is that some umber of privilege or hiding the ball passes over it if they pick up something and put it in the file. But the Supreme Court of the United States has said that is not the rule. The rule is if gathered from other sources regardless of the nature of the language or the huh, where the form came because the State recognized that it could hire somebody like Mr. Shirazi to come in and say that everything in the world has to do with 152 and the funding of highway safety, when in fact and in truth it isn't.

This accident report was issued ten years ago, Your Honor. There hasn't been any improvement to that highway system except for something that the parish required them to do and the parish had to

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do it itself. No work has been done.

Counsel, did you want to object?

MS. MCKENZIE:

No, I'm just –

MR. PALMINTIER:

Is there a reason why you stood up?

THE COURT:

Keep on with your argument.

MR. PALMINTIER:

Because I sat down during your argument.

MS. MCKENZIE:

I'm sorry, Your Honor, I apologize, I didn't realize that I wasn't allowed to stand.

THE COURT:

Just continue with your argument.

MR. PALMINTIER:

I was anticipating an objection.

THE COURT:

If she feels her legs or weak or she wants to stand she can.

MR. PALMINTIER:

And this, in fact, the holding of the United States Supreme Court that if another source, if the gathering of evidence was from another source then it's not privileged just because it's an accident

report that the State gathers and puts in its file. That's the holding of Pierce County. And what's more, it's a holding in Irion and other cases in the State of

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Louisiana. I mean, this Supreme Court has ruled in a number of different ways from Rickert to Long. Long doesn't have any application here, Your Honor. Long has to do with whether or not letters sent to the parish.

THE COURT:

Okay. All right. I've heard enough. I need two minutes to walk in the back to see if my law clerk checked on thing I asked her to check, okay, and I will be back in here and give you my ruling on all of these things, okay.

MS. MCKENZIE:

Your Honor, I apologize, that writ granted in the Athomont case, which I offered into evidence, was that admitted?

THE COURT:

Huh, that writ, you don't put law into evidence so it's huh, --

MS. MCKENZIE:

Can you take judicial notice of it?

THE COURT:

-- part of your brief. I'll take it as part of your brief.

MS. MCKENZIE:

Thank you.

(RECESS.)
(BACK ON THE RECORD.)

THE COURT:

All right. Be seated. Let's go down the list. All right. The Motion in Limine

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to exclude the evidence of blood/alcohol content, particular in regard to the hospital records of the Baton Rouge General. I've listened to everything y'all have said and additionally I don't know if any one of y'all cited it, you may have or not, Gore versus City of Pineville particularly states that Judge Knoll who is now Justice Knoll, the Court is going to allow them to be admitted. Now, that does not mean that I'm still concerned about the statements in those reports. The reports are there, they're admitted as is the statements in the reports, which specifically, and I'm going to point this out so I don't want to hear hollering when it comes down to the point of two pages saying that they weren't for legal use and everything else. He can hop on it all he wants. They're in, the entire

thing is in. The photos of the accident scene are admitted. I will --

MR. AYRES:

I'm sorry, what was the last ruling, Your Honor?

THE COURT:

The photographs of the scene, I already ruled on that. I'm going to allow the testimony of Dr. Lykissa, particular because I'm allowing the reports in. It's a two-edge sword and I think the reports have some issues there particular in regard

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to protocol. I look at Gore versus City of Pineville that says it's not excludable because of that but it surely is an issue. And I think the doctor can go into that issue in that and I'm going to allow that.

Jason Campbell, I've already denied that. He's going to be allowed to testify.

The res judicata issue, I've already ruled on. It's not res judicata and y'all can do whatever y'all are going to do on that.

The remaining issue is the exception – the Motion in Limine in regard to the accident reports under 409 and 402. I still, in this day and time we tend to forget what we are here in this court to determine and that's to determine what happened and why. And it gets more and more that we don' t want the judge or the jury to know what the true

facts are because of many exclusions and the like. I do not believe the intent of 409 is as broad as it has attempted to be developed by the State to the point that virtually anything that shows what occurred at the time is no longer under their terms admissible because we use it to do studies with it. I don't believe that was the intent of Congress. I just do not believe that. We had uniform accident – not only accident reports but we had uniform

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accident reports developed by the State of Louisiana long before 409 was even in existence and being used to develop all sorts of data and even just for the officers to testify as to what happened at the time. I do not believe the reports in and of themselves are inadmissible. I don't think these files that you have over there that huh, that contain reports or even the results of your surveys and your final conclusions and all that, that's covered by 409, I truly believe that. I don't necessarily agree with it, okay, but I agree that it's not admissible and not discoverable. You know, it bothers me that the State can get these reports, make this data but there's no teeth in it after saying that once you discover something then you must fix it. There's no must there. After you do it you can take it and put it in your files somewheres and forget about it and no one gets to see it unless they go prove it otherwise. Congress needs to think about that sometimes when they pass these things. I don't mind them doing it, but they ought to put some teeth that if you find something wrong you ought to be required to fix it or it becomes public or whatever, I don't know. But anyway, that's beyond

what this motion is. This is on the accident report themselves. If they meet admissibility for other reasons they are

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not inadmissible if huh, in regard to the 409/402 issue, all right.

I'll wait to the point that they're offered to determine any other State grounds in regard to that.

Did I miss any motions for y'all?

MR. PALMINTIER:

I think you got it, Judge.

THE COURT:

Okay. Now, before we leave here today, tomorrow morning nine o'clock we will start jury selection.

BAILIFF:

Judge, I think we'll be in the main courtroom. I don't think they have anything.

THE COURT:

I just asked them and they couldn't give me a definitive yet. I heard that "I don't think" but that doesn't mean anything to me, okay. If m not sure exactly, we'll see in the morning where we're gonna

be physically at. If we're not in the big one we'll be in this one. I'm a little concerned about jury venire. It's my fault, I should've looked at the original drawing of the jurors. They should have drew more. I think we'll get a jury but you get people who are sick or you get a student who's in classes or something, you know, you get some excuses. I think we have enough to get a jury, but I will –

* * *

APPENDIX F

18TH JUDICIAL DISTRICT COURT
PARISH OF WEST BATON ROUGE
STATE OF LOUISIANA

NUMBER: 28196
DIV.: "D"

[Dated October 4, 2006]

JERRY GOZA AND	)
GLADYS P. GOZA	)
	)
VERSUS	)
	)
PARISH OF WEST BATON	)
ROUGE STATE OF LOUISIANA	)
AND ABC INSURANCE COMPANY	)
	)

MOTION IN LIMINE PURSUANT TO 23 U.S.C. §409 AND 23 U.S.C. § 402

NOW INTO COURT, through undersigned counsel, comes defendant, the State of Louisiana through the Department of Transportation and Development (hereinafter sometimes referred to as "DOTD"), which states:

1.

Plaintiff has obtained crash reports involving accidents at the location of the plaintiff's accident in the above captioned matter.

2.

However, the crash reports are inadmissible in any form for the following reasons, to wit:

3.

In order to qualify for federal funding for highway safety improvement projects, a state must collect, compile and report highway accident crash data pursuant to 23 U.S.C. § 409 and 152§. Louisiana charges its various law enforcement agencies with the responsibility for the collection of that required highway crash data and requires that they utilize a uniform crash report from for that purpose.

4.

In Louisiana, all traffic accidents, whether investigated by state, parish or municipal agencies, are required to be reported on the Uniform Motor Vehicle Traffic Crash Report, deisgned by the Louisiana Highway Safety Commission, DOTD, and the Department of Public Safety, with the input of parish and municipal agencies for the purposes of complying with the federal requirements imposed by the Highway Safety Act of 1966 and its subsequent amendments to fulfill its § 402 and § 152 obligations.

5.

The Highway Safety Act of 1973 imposed a requirement pursuant to 23 U.S.C. § 152 that each state shall conduct and maintain an engineering survey for all public roads to identify hazardous locations, to assign priorities for the correction of such locations, and to establish and implement a schedule of projects for their improvement using the data compiled and collected from the Uniform Crash Reports.

6.

23 U.S.C. § 409 protects both information the agency compiled for § 152 purposes and any information the agency collects from other sources for a § 152 purpose.

7.

The crash reports obtained by plaintiffs were prepared, compiled and collected for a 23 U.S.C. § 152 purpose so that they are neither admissible nor discoverable pursuant to 23 U.S.C. § 409 and 23 U.S.C. § 402.

8.

Furthermore, any testimony based upon or comment on information obtained from the privileged documents is inadmissible under existing jurisprudence and to allow otherwise would circumvent and undermine the intent of 23 U.S.C. § 409.

9.

In addition to being protected pursuant to 23 U.S.C. § 409 and § 402, crash reports are inadmissible hearsay on their face.

Therefore, the DOTD respectfully requests that this Honorable Court to grant its Motion in Limine and exclude the crash reports and prohibit any testimony based upon or comment on information obtained from the privileged documents.

Respectfully Submitted,

CHARLES C. FOTI, JR.
ATTORNEY GENERAL

BY: /s/ _____

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APPENDIX G

STATUTES

23 U.S.C. § 152. Hazard elimination program

(a) In general.--

(1) Program.--Each State shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations, sections, and elements, including roadside obstacles and unmarked or poorly marked roads, which may constitute a danger to motorists, bicyclists, and pedestrians, assign priorities for the correction of such locations, sections, and elements, and establish and implement a schedule of projects for their improvement.

(2) Hazards.--In carrying out paragraph (1), a State may, at its discretion--

(A) identify, through a survey, hazards to motorists, bicyclists, pedestrians, and users of highway facilities; and

(B) develop and implement projects and programs to address the hazards.

(b) The Secretary may approve as a project under this section any safety improvement project, including a project described in subsection (a).

(c) Funds authorized to carry out this section shall be available for expenditure on--

(1) any public road;

(2) any public surface transportation facility or any publicly owned bicycle or pedestrian pathway or trail; or

(3) any traffic calming measure.

(d) The Federal share payable on account of any project under this section shall be 90 percent of the cost thereof.

(e) Funds authorized to be appropriated to carry out this section shall be available for obligation in the same manner and to the same extent as if such funds were apportioned under section 104(b), except that the Secretary is authorized to waive provisions he deems inconsistent with the purposes of this section.

(f) Each State shall establish an evaluation process approved by the Secretary, to analyze and assess results achieved by safety improvement projects carried out in accordance with procedures and criteria established by this section. Such evaluation process shall develop cost-benefit data for various types of corrections and treatments which shall be used in setting priorities for safety improvement projects.

(g) Each State shall report to the Secretary of Transportation not later than December 30 of each year, on the progress being made to implement safety improvement projects for hazard elimination and the effectiveness of such improvements. Each State report

shall contain an assessment of the cost of, and safety benefits derived from, the various means and methods used to mitigate or eliminate hazards and the previous and subsequent accident experience at these locations. The Secretary of Transportation shall submit a report to the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives not later than April 1 of each year on the progress being made by the States in implementing the hazard elimination program (including but not limited to any projects for pavement marking). The report shall include, but not be limited to, the number of projects undertaken, their distribution by cost range, road system, means and methods used, and the previous and subsequent accident experience at improved locations. In addition, the Secretary's report shall analyze and evaluate each State program, identify any State found not to be in compliance with the schedule of improvements required by subsection (a) and include recommendations for future implementation of the hazard elimination program.

(h) For the purposes of this section the term "State" shall have the meaning given it in section 401 of this title.

La. C.E. art. 703. Bases of opinion testimony by experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences

upon the subject, the facts or data need not be admissible in evidence.

La. C.R. art. 803. Hearsay exceptions; availability of declarant immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or his future action. A statement of memory or belief, however, is not admissible to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's testament.

(4) Statements for purposes of medical treatment and medical diagnosis in connection with treatment. Statements made for purposes of medical treatment and medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the

inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis in connection with treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence and received as an exhibit but may not itself be taken into the jury room. This exception is subject to the provisions of Article 612.

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, including but not limited to that which is stored by the use of an optical disk imaging system, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if made and kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make and to keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. This exception is inapplicable unless the recorded information was furnished to the business either by a person who was routinely acting for the business in reporting the information or in circumstances under which the statement would not be excluded by the hearsay rule. The term "business"

as used in this Paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports which are specifically excluded from the public records exception by Article 803(8)(b) shall not qualify as an exception to the hearsay rule under this Paragraph.

(7) Absence of entry in records of regularly conducted business activity. Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of Paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. (a) Records, reports, statements, or data compilations, in any form, of a public office or agency setting forth:

(i) Its regularly conducted and regularly recorded activities;

(ii) Matters observed pursuant to duty imposed by law and as to which there was a duty to report; or

(iii) Factual findings resulting from an investigation made pursuant to authority granted by law. Factual findings are conclusions of fact reached by a governmental agency and may be based upon information furnished to it by persons other than agents and employees of that agency.

(b) Except as specifically provided otherwise by legislation, the following are excluded from this exception to the hearsay rule:

(i) Investigative reports by police and other law enforcement personnel.

(ii) Investigative reports prepared by or for any government, public office, or public agency when offered by that or any other government, public office, or public agency in a case in which it is a party.

(iii) Factual findings offered by the prosecution in a criminal case.

(iv) Factual findings resulting from investigation of a particular complaint, case, or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences.

(9) Records of vital statistics. Records or data compilations, in any form, of birth, filiation, adoption, or death, including fetal death, still birth, and abortion, or of marital status, including divorce and annulment, if the report thereof was made to a public office pursuant to requirements of law, and any record included within the Louisiana Vital Statistics Laws.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in

accordance with Article 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, filiation, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. Records of documents purporting to establish or affect an interest in property to the extent that their admission is authorized by other legislation.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the

purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established, or statements in a recorded document as provided by other legislation.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or, in a civil case, relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, such a statement may be read into evidence and received as an exhibit but may not be taken into the jury room.

(19) Reputation concerning personal or family history. Reputation, arising before the controversy, among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, filiation, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of six months, to prove any fact essential to sustain the judgment. This exception does not permit the prosecutor in a criminal prosecution to offer as evidence the judgment of conviction of a person other than the accused, except for the purpose of attacking the credibility of a witness. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Testimony as to age. A witness' testimony as to his own age.

La. R.S. 32:398. Accident reports; when and to whom made; information aid; fees for copies; fees for accident photographs

A. The driver of a vehicle involved in an accident resulting in injury to or death of any person or property damage in excess of five hundred dollars shall:

(1) Immediately, by the quickest means of communication, give notice of the accident to the local police department if the accident occurs within an incorporated city or town or, if the accident occurs outside of an incorporated city or town, to the nearest sheriff's office or state police station.

(2) Give his name, address, and the registration number of the vehicle he was driving and, upon request and if available, exhibit his license or permit to drive to any person injured in such accident or to the driver or occupant of or person attending any vehicle or other property damaged in the accident.

(3) Give such information and, upon request, exhibit such license or permit to any police officer at the scene of the accident or who is investigating the accident.

(4) If the accident occurs in a geographical area under order of evacuation by a competent authority or is under a declared state of emergency, comply with the provisions of Paragraphs (1) and (2) herein within seventy-two hours after the occurrence of the accident.

B. The driver of any vehicle involved in an accident resulting in injury to or death of any person or total property damage to an apparent extent of one hundred

dollars or more shall, within twenty-four hours after the accident, forward a written report of the accident to the Department of Public Safety and Corrections. Any person who violates the provisions of this Subsection may be imprisoned for not more than sixty days or fined not more than one hundred dollars, or both.

C. The Department of Public Safety and Corrections may require the driver of a vehicle involved in an accident, which is required to be reported by this Section, to provide a supplemental report when the original report is insufficient in the opinion of the department and may require witnesses of an accident to render reports.

D. It shall be the duty of the state police or the sheriff's office to investigate all accidents required to be reported by this Section when the accident occurs outside the corporate limits of a city or town, and it shall be the duty of the police department of each city or town to investigate all accidents required to be reported by this Section when the accidents occur within the corporate limits of the city or town. Every law enforcement officer who investigates an accident, as required by this Subsection, shall instruct the driver of each vehicle involved in the accident to report the following to all parties suffering injury or property damage as an apparent result of the accident:

(1) The name and address of the owner and the driver of the vehicle.

(2) The license number of the vehicle.

(3) The name of the liability carrier for the vehicle, the name, address, and telephone number of the insurance agent who procured the liability policy providing coverage for the vehicle.

E. (1) Every law enforcement officer who investigates an accident shall initial the accident report form to show that the officer has complied with the provisions of Subsection D of this Section, and shall indicate on the accident report form whether the investigation is made at the scene of the accident or by subsequent investigation and interviews.

(2) Within forty-eight hours after completing the investigation, the investigating law enforcement officer shall forward a written report of the accident to the Department of Public Safety and Corrections. However, if the accident occurred within the corporate limits of a city or town, the enforcement office shall forward a written report of the accident to the police department of the city or town and a duplicate report to the Department of Public Safety and Corrections within forty-eight hours after completing the investigation.

F. The state police, any local police department, or any sheriff's office shall provide copies of crash reports to any interested person upon request and may charge a fee, not to exceed the sum of five dollars per report that does not exceed two pages, and seven dollars and fifty cents per report that exceeds two pages.

G. The state police, any local police department, or any sheriff's office shall provide copies of photographs of accidents or other photographs required of the investigating agency, video tapes, audio tapes, and any

extraordinary-sized documents, or documents stored on electronic media, to any interested person upon request and may charge a reasonable fee for such copies.

H. Every person holding the office of coroner in this state, or, in the event of a vacancy in the office, the person performing the duties of coroner, shall report to the Department of Public Safety and Corrections and to the Louisiana Highway Safety Commission the death of any person as a result of an accident involving a motor vehicle, and the circumstances of the accident within five days following such death. Such reports shall be made on forms supplied or approved by the department as provided for in Subsection I of this Section. Every hospital shall notify the coroner of the parish in which it is located of any death occurring in the hospital as a result of injuries sustained in a motor vehicle accident.

I. The Department of Public Safety and Corrections shall prepare and, upon request, shall supply to police, coroners, sheriffs, and other suitable agencies or individuals, forms for accident reports, calling for sufficient detailed information to disclose, with reference to a highway accident, the cause, conditions then existing, and the persons and vehicles involved. All accident reports required by this Section shall be made on forms supplied or approved by the Department of Public Safety and Corrections. Each accident report form supplied or approved by the department shall contain directions to the investigating officer to instruct the parties to the accidents to exchange information as required in Subsection D of this Section and shall contain a place

for the investigating officer to initial the report to indicate that he has given those instructions.

J. The Department of Public Safety and Corrections shall receive accident reports required to be made by this Section and may tabulate and analyze such reports and publish annually, or at more frequent intervals, statistical information based thereon as to the number, cause, and location of highway accidents. Based upon its findings after analysis, the department may conduct further necessary detailed research to determine more fully the cause and control of highway accidents. It may further conduct experimental field tests within areas in the state from time to time to prove the practicality of various ideas advanced in traffic control and accident prevention.

K. (1)(a) The reports required by this Section, and the information contained in the reports, shall be confidential, shall be exempt from the provisions of R.S. 44:1 et seq., and shall be made available only: to the parties to the accident, parents or guardians of a minor who is a party to the accident, and insurers of any party which is the subject of the report; to the succession representatives of those parties, or to the attorneys of the parties or succession representatives; or to a news-gathering organization that requests documents related to the accident. Upon request, accident reports shall be made available to the above-enumerated persons within seven working days following the completion of the accident investigation.

(b) In any parish with a population exceeding four hundred seventy-five thousand as of the 2000 federal decennial census, the local police department may charge a reasonable fee, not to exceed the sum of

twenty dollars, to provide copies of accident reports. State departments and agencies shall not be required to pay such fee.

(2) All persons and their agents are prohibited from screening accident reports if the person or his agent does not represent any of the persons involved in a particular accident, the report for which could reasonably be expected to be available. However, this limitation shall not prevent any person from requesting particular reports regardless of whether the person represents any party in the accident.

(3) The information in the reports may be tabulated and included in the statistical information published under the provisions of Subsection J of this Section.

(4) Nothing in this Section shall prohibit the sale of police accident reports or other driving record information to consumers of on-line driving records under written contract for purchase of records with the Department of Public Safety and Corrections.

(5) The information in the reports may be used by the office of motor vehicles for the purpose of maintaining operating records.

L. Whenever any person is involved in an accident resulting in injury to or death of any person, or property damage in excess of five hundred dollars and the law enforcement officer investigating the accident has reason to believe that there exists a medical condition which constitutes cause for revocation or suspension under the provisions of R.S. 32:414(E), notification of such medical condition shall be made to the medical/conviction unit of the office of motor

vehicles of the Department of Public Safety and Corrections, provided that the law enforcement officer first consults with his superior officer as to his specific observations and such superior officer concurs with the issuing officer's belief.

M. (1) All police, state or local, shall immediately contact the Department of Transportation and Development district office when called to the scene of an accident where that department's property has been damaged in an amount which is estimated to exceed five hundred dollars.

(2) All police, state or local, shall forward copies of accident reports which indicate damage to property of the Department of Transportation and Development in an amount which is estimated to exceed five hundred dollars to the department's headquarters maintenance division within six days of the date of the accident without cost to the department.

No. 09-1085

In The Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

JERRY GOZA AND GLADYS P. GOZA,

Respondents.

On Petition For Writ Of Certiorari To The State Of Louisiana First Circuit Court Of Appeal

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Louisiana First Circuit Court of Appeal correctly applied this Court's holding in *Pierce County, Washington* v. *Guillen*, 537 U.S. 129 (2003), in affirming admission of accident reports obtained from the West Baton Rouge Parish Sheriff's Office in litigation against the Louisiana Department of Transportation and Development over the DOTD's claim of privilege under 23 U.S.C. § 409.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Louisiana First Circuit Court of Appeal is reported at 21 So. 3d 320 (La. App. 1 Cir. 5/5/09) (Pet. App. 1a), *writ denied*, 23 So. 3d 919 (La. 12/11/09) (Pet. App. 50a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATEMENT

Jerry and Gladys Goza sued the Louisiana Department of Transportation and Development in tort for personal injuries suffered as a result of an automobile accident. The Department, relying on 23 U.S.C. § 409, moved *in limine* to exclude accident reports obtained from the West Baton Rouge Parish Sheriff's Office. The trial court denied the Department's motion; the reports were admitted; the jury returned a verdict in favor of the Gozas. The First Circuit Court of Appeal affirmed, holding that 23 U.S.C. § 409 was inapplicable since the accident reports were prepared by law enforcement officials pursuant to their duty to compile accident reports and not pursuant to the statutory objectives of the

National Highway Safety Act, 23 U.S.C. § 152. (Pet. App. 6a-7a).

ARGUMENT

I. THE FIRST CIRCUIT COURT OF APPEAL PROPERLY APPLIED THIS COURT'S HOLDING IN *PIERCE COUNTY, WASHINGTON* v. *GUILLEN*.

In *Pierce County* v. *Guillen*, 537 U.S. 129 (2003), this Court rejected the overblown interpretation of 23 U.S.C. § 409 that the Louisiana Department of Transportation and Development urged in the trial court and in the Court of Appeal below. The same sweeping interpretation of § 409 is heatedly re-urged in the State's petition here. But to no avail, we submit.

Quite the contrary, in *Pierce County* this Court adopted the United States Government's interpretation of 409 which, "takes a narrower view of the privilege by making it inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives. We therefore adopt this interpretation." 537 U.S., at 145-146.

The United States Government's brief in *Pierce County* v. *Guillen* stressed the very distinction drawn by the trial court and the Louisiana First Court of Appeal below, *viz.*: —

> Thus, for example, if discovery were sought from a county or a county sheriff's office seeking all reports that the sheriff's office had received or generated about accidents at a certain location within a certain number of years, and if the sheriff's office had received or generated those reports for routine law enforcement purposes, a court should not conclude that the sheriff's office had either "compiled or collected" those reports for Section 152-related purposes. That would be true even if copies of those accident reports already had been, or were later, transmitted to the state highway department or country planning agency, which intended to use them for its own Section 152-related purposes.

U.S. Gov. Brief, *Pierce County*, at 31.

Or, as this Court stated in *Pierce County*: —

> Put differently, there is no reason to interpret § 409 as prohibiting the disclosure of information compiled or collected for purposes unrelated to § 152, held by government agencies not involved in administering § 152, if, before § 152 was adopted plaintiffs would have been free to obtain such information from those very agencies.

537 U.S., at 146.

CONCLUSION

This Court should reject petitioner's effort to clothe § 409 with new formulary garb. The petition for certiorari should be denied.

Respectfully submitted,

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